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MICHAEL RODAK, JR.,

APPENDIX

In the Supreme Court of the United States

October Term, 1972

No. 71-1553

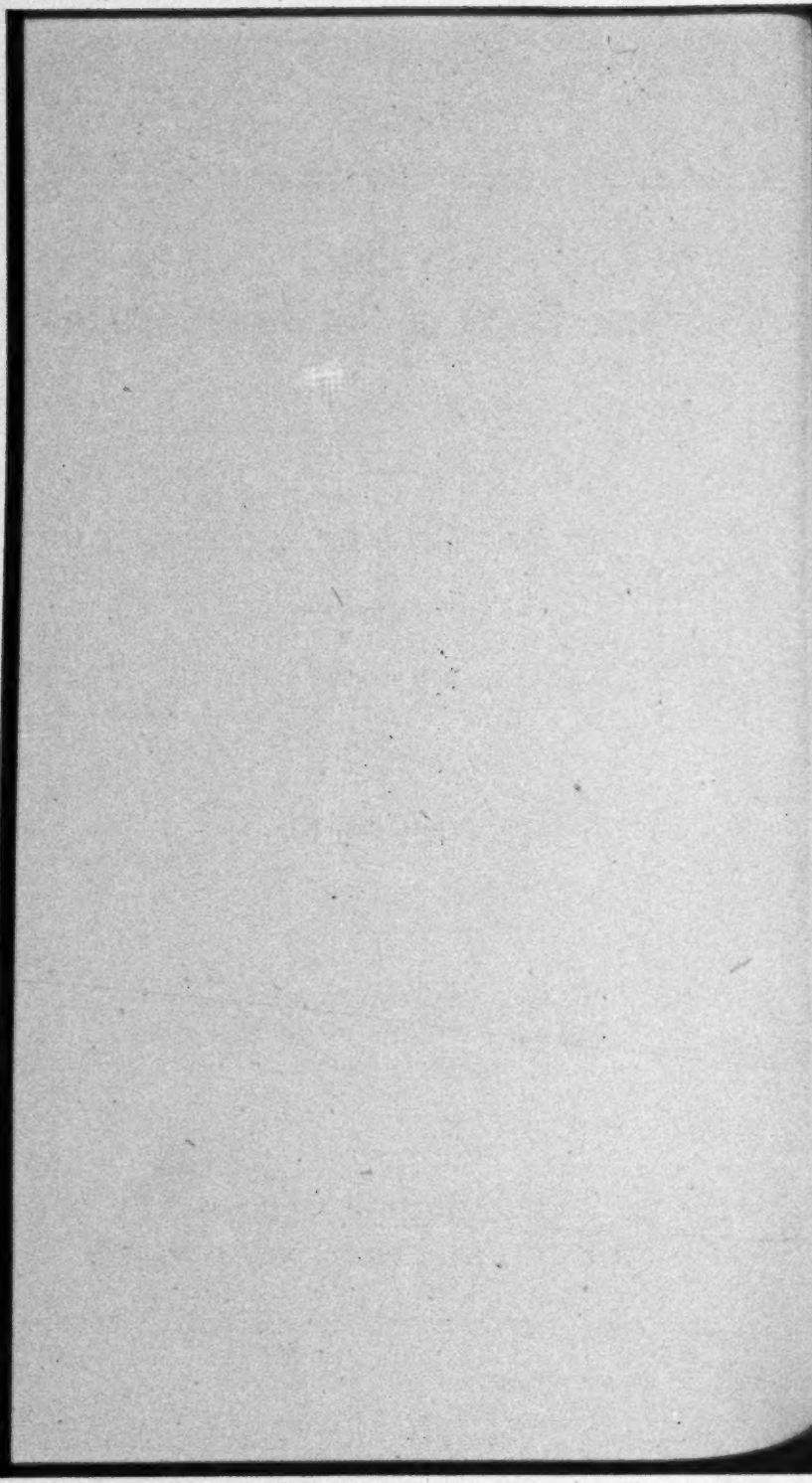
JOHN J. GILLIGAN, GOVERNOR OF OHIO, ET AL.,
Petitioners,

v.

CRAIG MORGAN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 20, 1972
CERTIORARI GRANTED OCTOBER 24, 1972



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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Date	Proceedings
10-15-70	Complaint filed. Summons issued.
	• • •
11-30-70	Motion of defendants to Dismiss with Memorandum in Support filed. Copy mailed 11-27-70.
	• • •
3-4-71	Order granting defendant's Motion to Dismiss filed, Connell, J. Copies to Weinstein, Bayer, Harshman & Nemeth.
3-23-71	Notice of pltfs. of appeal filed. Copy by Clerk to Weinstein & Nemeth.
3-23-71	Bond on Appeal filed. (Fidelity & Dep. Co. of Maryland)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

4-29-71	Certified record (1 vol. pleadings), filed; and cause docketed.
10-5-71	Cause argued and submitted (Before: Edwards, Celebrezze and McCree, JJ.)
2-15-72	Judgment of the District Court reversed and the case remanded for further proceedings.
2-15-72	Opinion by Edwards, J. (Celebrezze, J. concurring in part and dissenting in part.)
	• • •
5-18-72	Copy of letter from Clerk of Supreme Court to counsel for Appellee advising that time for filing petition for writ of certiorari was extended on 5-15-72 to 5-22-72.
6-5-72	Notice of filing petition of John J. Gilligan, Governor of Ohio, for certiorari 5-20-72 (Sup. Ct. No. 71-1553)
6-20-72	Certified record for certiorari application, including original record on appeal, mailed to Supreme Court.

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RELEVANT PLEADINGS AND OPINIONS

COMPLAINT

(Signatures and acknowledgments omitted)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CRAIG MORGAN
THOM DICKERSON
and
WILLIAM SLOCUM
suing individually and on behalf of all others similarly situated
Plaintiffs,

—vs—

JAMES RHODES
Governor of Ohio
State House
Columbus, Ohio

SYLVESTER DEL CORSO
Adjutant General of The Ohio National Guard
Fort Hayes
Columbus, Ohio

ROBERT CANTERBURY
Assistant Adjutant General of The Ohio National Guard
Fort Hayes
Columbus, Ohio
Defendants.

Case No. C 70-961

COMPLAINT

Plaintiffs, by their attorney, Harold Weinstein, for their complaint herein, allege:

1. Plaintiff Morgan is a full-time student enrolled in Kent State University and is President of Kent State University's student body. Plaintiff Morgan is a resident of Columbus, Ohio.

2. Plaintiff Dickerson is a full-time student enrolled in Kent State University and is Vice-President of Kent State University's student body. Plaintiff Dickerson is a resident of Huntington, New York.

3. Plaintiff Slocum is a full-time student enrolled in Kent State University and is President Pro Tem of Kent State University's student senate. Plaintiff Slocum is a resident of Geneva, Ohio.

4. Plaintiffs bring this action in their individual capacities and also on behalf of all persons who are students of Kent State University and are, as a consequence, similarly situated. (Referred to hereafter as "other students.") The class is so large that joinder of all members is impracticable. There are questions of law and fact common to the claims of plaintiffs and those of the other students, and plaintiffs' claims are typical of those of the entire class. Defendants, and their agents, have acted, and threaten to act, toward the entire class in such a manner as to make appropriate an injunction and declaratory judgment on behalf of the entire class.

5. Defendant Rhodes is Governor of Ohio and, pursuant to his office, is Commander-in-Chief of the Ohio National Guard and has authority to call to active duty, supervise and direct, the operations of Ohio National Guard troops.

6. Defendant Del Corso is a general of the Ohio National Guard, is Adjutant General of the Ohio National Guard and directs and supervises the training, procedures and operations of the Ohio National Guard.

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7. Defendant Canterbury is a general of the Ohio National Guard, is Assistant Adjutant General of the Ohio National Guard and, upon information and belief, assists Defendant Del Corso in directing and supervising the training, procedures and operations of the Ohio National Guard. Defendant Canterbury was in direct command of a contingent of Ohio National Guard troops which had been called to active duty and assigned, on or about May 2, 1970, to operate in and about the main campus of Kent State University, as set forth in greater detail below.

8. Kent State University is a State University organized and operated pursuant to the laws of Ohio and has its main campus in the City of Kent, Portage County, Ohio. From about May 1, 1970, to May 4, 1970, Kent State University was the scene of certain demonstrations and disorders, as set forth in greater detail below. Any references hereafter to events at "The Kent Campus" refer to Kent State University's main campus.

9. This Court has jurisdiction of this action pursuant to Title 42, United States Code, Section 1983 and Title 28, United States Code, Sections 1343 (3) and 2201, in that plaintiffs seek to redress the deprivation, under color of State law, of rights, privileges and immunities secured by the Constitution of the United States by means of injunctive relief and a declaratory judgment.

10. On or about May 1, 1970, there occurred certain disorders in the area of the Kent campus which resulted in the imposition of a curfew by the mayor of Kent. Thereafter, demonstrations and disorders continued in and about the Kent campus.

11. On May 2, 1970, Defendant Rhodes ordered certain contingents of the Ohio National Guard to duty in and around the Kent campus under the supervision and direction of Defendants Del Corso and Canterbury. Thereafter,

the Ohio National Guard troops, under the continued direction of defendants, committed certain acts which, as set forth below, deprived plaintiffs and other students of rights, privileges and immunities secured by the United States Constitution.

The actions and operating methods of the Ohio National Guard, together with a continuation of the same rules, procedures and operating methods followed by the Ohio National Guard under defendants' supervision and direction creates a substantial threat of repetition of similar acts and continues to deprive plaintiffs and other students of rights, privileges and immunities secured by the United States Constitution.

12. Specifically, plaintiffs complain of the following past and continuing acts and conditions:

(a) Defendant Rhodes prematurely ordered Ohio National Guard troops to duty in and around the Kent campus to maintain order and perform functions normally reserved to police officers at a time when there was neither an invasion nor a breakdown of civilian authority and when civilian police forces were capable of administering civilian laws and maintaining order. The displacement of civilian police under such circumstances by a military force itself deprived plaintiffs and other students of rights secured by the First and Fourteenth Amendments, in that the presence of a military force inhibited the exercise of the rights of lawful assembly, speech and association. In addition, the unnecessary use of a military force to perform the functions of civilian police substantially increased the risk of legally unjustified killing and injuring of civilians. On May 4, 1970, members of the Ohio National Guard fired their guns into a crowd of persons on the Kent State University main campus, injuring several students and killing four. The culpable and legally unjustified shooting

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of unarmed civilians by Ohio National Guard troops deprived such persons of life and liberty without due process of law. Unless this court enjoins Defendant Rhodes from prematurely displacing normal civilian authority with Ohio National Guard troops, plaintiffs and other students are imminently threatened with similar deprivations of life and liberty without due process of law and further deprivation of rights secured by the First and Fourteenth Amendments to the United States Constitution as a result of the unnecessary presence of a military force in and about the Kent campus. This threat is a real one and is exacerbated by Defendant Rhodes' actions in following a pattern throughout the State of Ohio of continued and premature use of Ohio National Guard troops to displace civilian authority far in excess of the National norm.

(b) Defendants failed to adequately provide Ohio National Guard troops with specialized training in control of civilian disorders or to provide them, when assigned to the Kent campus, with adequate equipment for dealing with civilian disorders by means other than the use of deadly force when such equipment, better adapted for dealing with civilian disorders than that utilized by the Ohio National Guard troops at the Kent campus, was available. Defendants also caused and ordered Ohio National Guard troops to carry live bullets ready for firing in their guns when on duty in and about the Kent campus. The use of inadequately trained troops, their lack of equipment adapted for control of civilian disorders, and the use by Ohio National Guard troops of guns loaded with live bullets to control civilian disorders substantially increased the risk of the injuries and killings which occurred and, therefore, the deprivations of life and liberty without due process of law which occurred on May 4, 1970. This risk remains and constitutes a real threat to plaintiffs and other students of further deprivations of life and liberty without due process of law. Defendants continue to inadequately train Ohio Na-

tional Guard troops for civilian disorder control, continue to fail to equip them with adequate equipment for dealing with civilian disorders and to cause and order them to carry live bullets loaded in their guns while on duty during civilian disorders. In addition, defendants have failed to instruct and order Ohio National Guard troops to limit their use of deadly force during civilian disorders to those instances in which deadly force could lawfully be used by police officers.

(c) Defendants permitted and caused Ohio National Guard troops to (1) engage in unlawful and unjustified beatings of students in and around the Kent campus. Beatings were administered to some students by Ohio National Guard troops, in part as a result of the exercise of the rights of speech and assembly by students who were beaten, and others. Defendants also permitted and caused Ohio National Guard troops to unlawfully detain, and cause to be detained, students, some as a result of the exercise by such students, and others, of the rights of speech and assembly. These actions of defendants, and their agents, have deprived persons of liberty without due process of law and constituted a direct punishment without due process of law for the exercise of rights protected by the First and Fourteenth Amendments to the United States Constitution. Because of the past actions of defendants' agents and defendants' continued excessive use of Ohio National Guard troops to displace civilian authority during campus disorders, there remains a very real threat that plaintiffs and other students will be subjected to similar beatings and detentions in the future and thereby be deprived of the same rights. The threat of such punishment for exercise of rights protected by the First and Fourteenth Amendments inhibits and intimidates plaintiffs and other students in their exercise of such rights.

(d) Defendants caused and ordered Ohio National Guard troops to break up lawful and peaceable meetings,

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demonstrations and assemblies in and about the Kent campus and thereby deprived plaintiffs and other students of their rights of speech, assembly, association and petition of government. The meetings, demonstrations and assemblies broken up were, in part, protesting against the occupation of the campus by a military force. Defendants' actions violated the First and Fourteenth Amendments to the United States Constitution and substantially increased the risk of the unjustified killings and injuries which occurred on the Kent campus on May 4, 1970. They were not legitimatized by the application of concepts of Martial Law, because there was neither an invasion nor breakdown of civilian authority. Moreover, to the extent that any provision of Ohio law either authorize the imposition of Martial Law except during time of invasion or breakdown of civil authority, or authorized a suspension of First Amendment rights as a consequence of the declaration of Martial Law, lawful or otherwise, they violate the First and Fourteenth Amendments to the United States Constitution. Defendants' past action in ordering Ohio National Guard troops to break up lawful assemblies creates a real threat to plaintiffs and other students that, if they participate in lawful activities they will be assaulted, killed, injured or unlawfully detained by Ohio National Guard troops.

(e) Defendants, and their agents, acted in part under the authority of Section 2923.55 of the Ohio Revised Code which provides, in pertinent part, that "members of the organized militia . . . when engaged in suppressing a riot or in dispersing or apprehending rioters and after an order to desist and disperse has been issued pursuant to Section 2923.51 of the Revised Code, are guiltless for killing, maiming or injuring a rioter as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend rioters." Section 2923.55 threatens plaintiffs and other students with deprivation of life and liberty without due process of law in violation of the Four-

teenth Amendment to the United States Constitution in that it authorizes the injuring, killing and maiming of rioters by Ohio National Guard members and substantially increases the risk of use of deadly force in civilian disorders, thereby threatening not only rioters but all other persons in the vicinity of civilian disorders. Section 2923.55 further invidiously discriminates against persons who might, even erroneously, be identified as a rioter during civilian disorders, on no rational basis and singles out such persons for injuring, killing or maiming. Moreover, the existence of Section 2923.55, in connection with the other violations of rights set forth in this paragraph, increases the risk of further injury and killing of students, including plaintiffs, and therefore constitutes an imminent threat of deprivation of plaintiffs, and the other students, of the rights set forth above.

13. Plaintiffs and other students have no adequate remedy at law, because of the threat that irreparable harm, in the form of further deprivations of privileges, rights and immunities protected by the First and Fourteenth Amendments to the United States Constitution, will be effected by defendants, and Ohio National Guard troops operating under their direction, unless the relief sought in this action is granted. This controversy is neither moot nor unripe for decision, because the practices and conditions which resulted in the past violations alleged in this complaint still obtain and directly threaten plaintiffs and other members of their class.

WHEREFORE, plaintiffs request that this Court enter judgment as follows:

(a) Enjoining Defendant Rhodes, and his successors in office, from ordering Ohio National Guard troops to maintain order or replace normal police forces in and about the Kent campus except in case of actual invasion or such breakdown of civilian authority that available civilian police forces are incapable of maintaining public order and

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administering the laws, and declaring any contrary use of Ohio National Guard troops in and about the Kent campus to be unlawful.

(b) Enjoining Defendants Rhodes, Del Corso and Canterbury, and their successors in office, from using Ohio National Guard troops for the control of civilian disorders in and about the Kent campus unless such troops have been competently trained in techniques of civilian disorder control, have been provided with the best available non-lethal equipment for use in civilian disorder control, have been specifically ordered and instructed not to use deadly force except in the case of actual self-defense or upon persons who have actually used or threatened the use of deadly force and have been ordered not to carry live ammunition loaded in their guns when engaged in such control of civilian disorders, and declaring the use of Ohio National Guard troops contrary to those requirements to be unlawful.

(c) Enjoining Defendants Rhodes, Del Corso and Canterbury from either ordering or permitting Ohio National Guard troops to beat plaintiffs or other students in and about the Kent campus or unlawfully detain them, and declaring any contrary acts to be unlawful.

(d) Enjoining Defendants, and their successors, from ordering or permitting Ohio National Guard troops in and about the Kent campus to break up and/or disperse peaceful meetings or assemblies or arrest persons for attending them, except that defendants may reasonably limit the place of such meetings for legitimate purposes other than to prevent their occurrence, and from declaring any suspension of the right of assembly and declaring any actions to the contrary to be unlawful.

(e) Declaring Section 2923.55 of the Ohio Revised Code to be unconstitutional and void; and

(f) Granting such other and further relief as this Court deems just and proper.

MOTION TO DISMISS, MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

(Caption, signatures, acknowledgments omitted)

MOTION TO DISMISS

Now come the defendants James A. Rhodes, Governor of Ohio, Sylvester Del Corso, Adjutant General, and Robert H. Canterbury, Assistant Adjutant General, by and through their attorney, Paul W. Brown, Attorney General, and move the Court to dismiss this action for the reason that the complaint fails to state a claim against them upon which relief can be granted.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

A reading of the complaint in the instant case discloses that plaintiffs are asking this Court to pass judgment on three points relating to the Ohio National Guard: (1) its training [Complaint, paragraph 12(b)], (2) its equipment (Ibid.), and (3) the immunity from liability of its members in the limited circumstances described in Section 2923.55, Revised Code, namely: when they are using "necessary and proper" force when suppressing a riot or dispersing or apprehending rioters [Complaint, paragraph 12(e)]. Further, plaintiffs ask the Court to enjoin the defendant Governor and his successors from "prematurely" ordering units of the Ohio National Guard to duty [Complaint, paragraph 12(a)].

While it is true that the Ohio Revised Code contains provisions relating to the Ohio National Guard, the training and service, supply and procurement functions of the Guard are controlled by federal law and regulations. See Article 32, Section 501 U.S. Constitution, *et seq.* and Article 32, Section 701, U.S. Constitution, *et seq.* Parenthetically, it is a matter of public knowledge that the defendant

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Adjutant General has already formally requested federal authorities to provide funds for non-lethal riot control devices for use by the Ohio National Guard, and had done so before the institution of this action.

Since federal law and regulations control them, it is clear that the complaint does not state a claim against the named defendants, all of whom are state officers, in regard to the training and equipment of the Ohio National Guard. If the Court determines, however, that the complaint does state such a claim, then it is suggested that the United States, or the appropriate agency thereof, would be an indispensably necessary part to this action, for the reason heretofore stated.

On the question of plaintiffs' attempt to prevent, by means of this action, a "premature" use of the Ohio National Guard in the future, it is submitted that any order of this Court couched in the terms plaintiffs suggest would constitute unwarranted judicial interference with the discretionary power of an executive officer of the state government and would pose grave problems of enforcement for the Court because of the very nature of the subject matter and the conditions under which questions of compliance with such an order would very likely be litigated.

As to the constitutionality of Section 2923.55, *supra*, it is submitted that this statute is so narrowly drawn that it can withstand the arguments plaintiffs would raise against it, and that these arguments, in fact, raise no substantial constitutional, or federal, question.

For the foregoing reasons, defendants urge that their motion to dismiss be sustained.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CRAIG MORGAN, et al.,
Plaintiffs,
v.
JAMES A. RHODES,
Governor of Ohio, et al.,
Defendants.

Case No. C 70-961

ORDER DISMISSING COMPLAINT

UPON CONSIDERATION,

This Court finds that the complaint in the above-captioned case fails to state a claim upon which relief can be granted in this Court. In accordance, it is

ORDERED, ADJUDGED and DECREED that the defendant's motion to dismiss is granted, and the case of *Morgan et al.* v. *Rhodes, et al.,* C 70-961 is hereby dismissed.

JAMES C. CONNELL, Judge
United States District Court

Dated March 4th, 1971.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The decision of the Court of Appeals was appended to Petitioners' Petition for a Writ of Certiorari.

Supreme Court of the United States

No. 71-1553

John J. Gilligan, Governor of Ohio, et al.,

Petitioners,

v.

Craig Morgan, et al.

ORDER ALLOWING CERTIORARI. Filed October 24 ----------, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth ---------- Circuit is granted.

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71-1553

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. . . . . .

Supreme Court, U. S.
FILED
MAY 20 1972
MICHAEL RODAK, JR., CLERK

JOHN J. GILLIGAN
Governor of Ohio

DANA L. STEWART
Adjutant General of Ohio

ROBERT H. CANTERBURY
Assistant Adjutant General,

Petitioners,

v.

CRAIG MORGAN

THOM DICKERSON

WILLIAM SLOCUM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM J. BROWN
Attorney General of Ohio

THOMAS V. MARTIN
Executive Assistant to the
Attorney General
State House Annex
Columbus, Ohio
Counsel for Petitioners

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No.

JOHN J. GILLIGAN
Governor of Ohio

DANA L. STEWART
Adjutant General of Ohio

ROBERT H. CANTERBURY
Assistant Adjutant General,

Petitioners

— v —

CRAIG MORGAN

THOM DICKERSON

WILLIAM SLOCUM

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John J. Gilligan, Governor of Ohio, Dana L. Stewart, Adjutant General of Ohio and Robert H. Canterbury, Assistant Adjutant General, respectfully pray that a writ of certiorari issue to review that portion of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 15, 1972, which remands the cause to the District Court to determine whether injunctive relief should be granted to control the training, weaponry and orders of the Ohio National Guard.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the District Court for the Northern District of Ohio, Eastern Division.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 15, 1972. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

The basis for jurisdiction in the first instance was 28 U.S.C. 1343 (3).

QUESTIONS PRESENTED

1) Whether the issue of the proper training, weaponry and orders of members of an organized National Guard is nonjusticiable as a political question.

2) Whether injunctive relief controlling the training, weaponry and orders of the National Guard would violate the longstanding policy against interference by a federal court with the legitimate activities of a state.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article 1, Section 8, Clause 16:

> The Congress shall have Power . . . To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of train-

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ing the Militia according to the discipline prescribed by Congress.

United States Code, Title 32:

§501. Training generally

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

§701. Uniforms, arms, and equipment to be same as Army or Air Force.

So far as practicable, the same types of uniforms, arms, and equipment as are issued to the Army shall be issued to the Army National Guard, and the same types of uniforms, arms, and equipment as are issued to the Air Force shall be issued to the Air National Guard.

STATEMENT OF THE CASE

During the first four days in May of 1970 disorders took place on and off the campus of Kent State University in Kent, Ohio. On the evening of May 2, 1970, the then Governor of Ohio in response to a request from the Mayor of Kent, Ohio, dispatched units of the Ohio National Guard to duty in Kent to assist the local authorities there in controlling the disorders. Respondents herein who were then students at Kent State University brought suit in Federal District Court against the Governor, the Adjutant General, and the Assistant Adjutant General of Ohio. They alleged that during the period that they were on duty in Kent, Ohio, members of the National Guard had violated students' rights to speech and assembly; beat and

injured students "needlessly"; and killed and injured a number of students without legal justification. They sought an injunction against the Governor to restrain him from "prematurely" ordering National Guard troops to duty; an injunction to restrain leaders of the National Guard from violating the students' constitutional rights in the future; and a declaration that Section 2923.55 of the Ohio Revised Code is unconstitutional. This Section provides that under certain detailed circumstances, law enforcement personnel who are engaged in suppressing a riot are "guiltless" for the consequences of the use of such force as is necessary and proper under the circumstances.

The District Court held that the complaint failed to state a claim upon which relief could be granted and dismissed the complaint.

The Court of Appeals affirmed the judgment of the District Court with respect to injunctive relief against the Governor. It also upheld the validity of Section 2923.55 *supra*. However, the Court with one judge dissenting, found that the complaint did state a cause of action with respect to the following issue:

> Was there and is there a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that nonlethal force would suffice to restore order and the use of lethal force is not reasonably necessary? (App. 18)

The Court remanded the cause to the District Court for further proceedings.

REASONS FOR GRANTING THE WRIT

The Decision Below is in Conflict with the Applicable Decisions of this Court with Respect to Political Questions

The applicable decisions of this Court show that the issue of the proper training, weaponry and orders of members of the Ohio National Guard is a nonjusticiable political question. The

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majority opinion of the Court below did not discuss this doctrine. It merely stated that its "diminished vitality" is illustrated by cases involving voting rights and prisoners' rights (App 19).

Baker v. *Carr*, 369 U.S. 186 (1962) cited by the majority as one of the voting rights cases did hold that the voting rights asserted therein did not constitute a political question. However, it did not hold that the political question doctrine was no longer viable. The opinion in that case thoroughly discussed the doctrine and set forth the factors which would render it applicable.

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional political department; or a lack of judicially discoverable and manageable standards of resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. (369 U.S. at 217)

Each of the above factors is present in the instant case. There is a "textually demonstrable constitutional commitment of the issue to a coordinate political department". Article I, Section 8, Clause 16, of the Constitution gives Congress the authority to prescribe the proper training, weaponry and discipline for the militia:

> The Congress shall have Power . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Pursuant to its constitutional authority, Congress has enacted legislation governing the training and weapons of the National Guard. Congress has provided that the training of the Army National Guard shall conform to the training of the Army. 32 U.S.C. 501. See also: 32 U.S.C. 502-507. It has also provided that the same types of arms and equipment shall be issued to the National Guard as are issued to the Army, 32 U.S.C. 701. In addition, Congress has authorized the President to prescribe regulations governing the National Guard.

> The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard. 32 U.S. C. 110.

There is a lack of judicially discoverable and manageable standards for resolving the issue. Courts are particularly ill suited for determining a proper system of training, weaponry or orders for a military organization such as the National Guard. The majority opinion below in an attempt to show manageable standards cites materials of the Federal Bureau of Investigation, the Department of the Army and the Police Department of New York City (App. 20). If a court were to require that the Ohio National Guard replace its present system of training and equipping its members with the system used by the F.B.I., the Army or the New York Police Department, it would have to make two fundamental assumptions. Petitioners contend that it is not a proper judicial function to make either assumption. The court would first have to find or assume in the absence of any dispute or controversy that these other systems are valid. The court would also have to find or assume that these other systems would enable the Ohio National Guard to properly perform its responsibilities and carry out its functions. These systems were evolved through experience and experimentation. They are adapted to guide these organizations in situations in which they are likely to be involved. The situations in which the F.B.I. or the New York Police Department may be involved may differ significantly from those in which the Ohio National Guard may be involved. What may be proper training and weapons in one

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situation may be inadequate in another.

A judicial determination of this issue would necessarily be inflexible. It could not take into consideration new developments and theories in the area. There are almost continuous advancements in the equipment and weapons available to the military. There are also new theories on the proper method of training troops. Courts are not equipped to provide the empirical research nor the continuing supervision and revision necessary for intelligent military planning. Cf. *McInnis* v. *Shapiro*. 293 F. Supp. 327 (N.D. Ill. E. D. 1968) affd. sub nom. *McInnis* v. *Ogilvie*, 394 U. S. 322 (1969).

If the court were to require the standards prescribed for the F.B.I. or the New York Police Department for members of the Ohio National Guard, it would clearly indicate a lack of respect for the legislative and executive branches of the government. It could also result in multifarious pronouncements by different branches on this issue. Congress has the responsibility under the Constitution to train and provide weapons and equipment for members of the National Guard. The President also has the responsibility by statute to prescribe regulations governing these matters. Any judicial determination as to the training or equipment of members of the National Guard would necessarily indicate a lack of confidence in the legislative and executive branches to carry out their responsibilities. If a court were to grant the requested relief, there is also a very real possibility of conflicting directions from the different branches of the government. Congress has enacted statutes pursuant to its constitutional authority and may enact new statutes or amend existing ones in the future. The President has also prescribed regulations on this subject. He is likely to issue new ones in the future.

> This power to prescribe and enforce regulations for the training and weaponry of the National Guard, which Congress has delegated in part to the President, is more than a mere token and unexercised authority. In July of 1967, when civil disorders had come to the forefront of national concern, President Johnson announced that he had ordered the addition of special training courses to the existing

National Guard training program. *Weekly Compilation of Presidential Documents*, Vol. 3, No. 30, at 1056 (1967). Moreover, under the authority delegated to the President, the Department of the Army has specifically set mandatory riot-control training requirements for all Army National Guard and certain Air National Guard units. *See Report of the National Advisory Commission on Civil Disorders, supra,* at 505 (1968). (Celebreeze, J. Dissenting Opinion) (App. 30).

Any relief which the district court grants would involve several if not all of the formulations identified by this Court as characteristic of a nonjusticiable political question. *Baker v. Carr, supra,* 369 U.S. 186; *Chicago & Southern Air Lines* v. *Waterman S. S. Corp,* 333 U.S. 103 (1948). See also: *Pauling* v. *McNamara,* 321 F 2d 796, 798 (D. C. Cir. 1964), *Beck* v. *Laird,* 429 F 2d 302, 305 (2d Cir. 1970).

The Decision Below Is Contrary To The Applicable Decisions Of This Court In The Area Of The Relationship Between The State And Federal Government

The decisions of this Court which involve the possibility of a conflict between the powers of the state and federal government establish that a federal court should be sensitive to the legitimate interests of the state. In protecting federal rights a court should also endeavor to avoid undue interference with the legitimate activities of the state. See e.g.,*Union Brokerage Co.* v. *Jensen,* 322 U.S. 202, 207-208 (1944). This policy was reaffirmed and explained in *Younger* v. *Harris,* 401 U.S. 37 (1971). This policy, referred to as "Our Federalism" recognizes that our country is composed of a union of separate states and reaffirms the belief that the national government will fare best if the individual states are left free to perform their separate functions in their separate ways. "Our Federalism" occupies an important place in our country's history. It played a significant part in the adoption of the Federal Constitution. The framers of our Constitution rejected both the idea of blind adherence to so-called

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"states' rights" and the idea of central control over every important issue by the federal government and its courts. Instead they adopted the concept of "Our Federalism", in which there is sensitivity to the legitimate interests of both the state and the federal government. The federal government under this system attempts to carry out its responsibilities in a manner which will not unduly interfere with the legitimate activities of the state (401 U.S. at 44).

This Court has also shown sensitivity to the interests of the individual states in other recent decisions.. *Askew* v. *Hargrave,* 401 U.S. 179 (1971) held that a federal court should abstain from considering the validity under the Equal Protection Clause of a state statute until the state court had an opportunity to construe it. Other decisions where this Court has shown deference to the judgment and interests of the state include *Gordon* v. *Lance,* 403 U.S. 1 (1971); *James* v. *Valtierra,* 402 U.S. 137 (1971); and *Dandridge* v. *Williams,* 397 U.S. 471 (1970).

Nothing could be more damaging to the interests of the State of Ohio than the decision of the court below. If on remand the court were to enjoin the existing system of training and weaponry of the Ohio National Guard and prescribe its own system it would restrict the discretion of the National Guard officials in dealing with future disorders. The power to prevent and suppress civil disorders is the most fundamental of powers. It is a prerequisite to the continued existence of the state and necessary to protect the safety and well-being of its inhabitants.

Petitioners do not contend that the conduct of the National Guard is not subject to judicial review. Neither do they contend that a court may not properly enjoin conduct which is unlawful on its face. This is not involved in the instant case. The legality or validity of the conduct challenged here depends upon the conditions which prevailed at the time of the disorders. Any injunctive relief granted herein will restrict the discretion of the National Guard leaders in responding to a given civil disorder (App. 32). This discretion by definition must be exercised under emergency conditions. Anything which hinders or restricts this discretion could cause irreparable injury to the

public health, safety and welfare.

The judgment below is contrary to the policy established by the decisions of this Court of not unduly interfering with the legitimate interests of the state. This justifies the grant of certiorari.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review that portion of the judgment and opinion of the Sixth Circuit which remanded the cause to the district court.

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APPENDIX

No. 71-1335

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Craig Morgan, Thom Dickerson and William Slocum, Suing individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

James Rhodes, Sylvester Del Corso and Robert Canterbury,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed February 15, 1972.

Before: Edwards, Celebrezze and McCree, Circuit Judges.

Edwards, Circuit Judge. In this case certain students at Kent State University, including officers of the Student Association, and other student organizations, seek broad injunctive relief against the Governor of Ohio and the commanding officers of the Ohio National Guard, and a declaratory judgment, declaring unconstitutional a certain immunity statute, Ohio Rev. Code § 2923.55 (Supp. 1969). The complaint was brought under 42 U.S.C. § 1983 (1970), with jurisdiction asserted under 28 U.S.C. § 1343(3) (1970).

The District Judge dismissed the complaint on motion without either answer or affidavits being filed by appellees, and without hearing. His brief order stated that the pleading failed to state a claim cognizable under federal law.

The disposition employed by the District Judge is, of course, the least favored judgment which the appellate courts review. Here the issues (assuming for the moment some triable issues were stated) have never become joined. Appellees have never even filed either answer or motion for summary judgment supported by affidavits.

When a case comes to us in such a posture, we are compelled to assume the truth of all of the plaintiffs' allegations of fact, plus the reasonable inferences which flow from those facts.

This court has recently restated these principles:

> "This cause having come before this Court on a dismissal, the allegations of the complaint must be taken as true, and any legitimate inferences arising therefrom must be construed in favor of the Appellants. *See* Jenkins v. McKeithen, 395 U.S. 411, 423-424, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969); Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959); Taylor v. Kentucky State Bar Association, 424 F.2d 478, 480 (6th Cir. 1970)." *Honey* v. *Goodman*, 432 F.2d 333,336 (6th Cir. 1970).

This fundamental statement of the same principles is found in a unanimous United States Supreme Court decision:

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[5]

No one is under our system of law turned away from the courthouse door without a proper adjudication if he has filed a sworn complaint which is cognizable in our law.

With these principles in mind, we turn to analyze the instant complaint. We believe that fairly read it seeks to state three related causes of action:

1) In the first instance the complaint is an attack upon the "premature" calling out of the Ohio National Guard by Governor Rhodes on May 1, 1970, and its dispatch to the campus of Kent State University "to displace civilian authority." The relief sought is an injunction against such "premature" employment of the Guard on future occasions.

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[5] See, e.g., *Leimer* v. *State Mutual Life Assur. Co.*, 108 F. 2d 302; *Dioguardi* v. *Durning*, 139 F. 2d 774; *Continental Collieries* v. *Shober*, 130 F. 2d 631." *Conley* v. *Gibson*, 355 U.S. 41,45-6 (1957).

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2) The complaint also constitutes an attack upon the conduct of the Guard troops upon their arrival at Kent State. Here the allegations are that the defendants, who controlled the troops, without necessity for doing so violated the students' rights of speech and assembly, made unconstitutional arrests, beat and injured students "needlessly" and employed live rifle fire against an unarmed crowd and killed and injured a number of students without appropriate legal justification. In this phase of the complaint the allegations also are that these claimed violations resulted from policies and practices of defendants which constitute a continuing pattern of conduct which threatens plaintiffs with future such violations.

3) The complaint also seeks a declaratory judgment finding unconstitutional an Ohio Statute, Ohio Rev. Code § 2923.55 (Supp. 1969), which under certain detailed circumstances purports to grant immunity to National Guard troops (and other law enforcement personnel) from criminal charges arising out of their activities in suppressing riots. Each of these causes of action (although dismissed as a whole) deserves separate consideration.

I The Attack Upon the Executive Emergency Power

In this aspect of this appeal appellants ask the courts to engage in prior restraint upon the exercise of emergency power specifically committed by constitution to the executive branch of government. In this phase of the pleading we find no facts which call for hearing, no relief sought which the court below could appropriately have granted, and no allegations of a breach of actionable rights. As to this aspect of the case, we affirm the District Court.

At the outset, this complaint concedes that there was disorder which had not been terminated by normal civilian controls and that such disorders were continuing as of the time the Governor called out the troops. The complaint says:

"10. On or about May 1, 1970, there occurred certain

disorders in the area of the Kent campus which resulted in the imposition of a curfew by the mayor of Kent. Thereafter, demonstrations and disorders continued in and about the Kent campus."

Executive decisions to call out military force have been litigated a number of times in the history of the Republic. *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946); *Sterling* v. *Constantin*, 287 U.S. 378 (1932); *Moyer* v. *Peabody*, 212 U.S. 78 (1909); *Ex parte Milligan*, 71 U.S. 2 (1866); *Luther* v. *Borden*, 48 U.S. 1 (1849); *Martin* v. *Mott*, 25 U.S. 19 (1827). But we find no instance where the courts have sought to substitute judicial judgment for the constitutionally empowered judgment of the executive. Still less have the courts cumbered that executive judgment with the prior restraint of an injunction seeking to describe in advance the precise conditions which would make its exercise appropriate.

Indeed, in the case principally relied upon by appellants, the Supreme Court of the United States said:

> "As the State has no more important interest than the maintenance of law and order, the power it confers upon its Governor as Chief Executive and Commander in Chief of its military forces to suppress insurrection and to preserve the peace is of the highest consequence. The determinations that the Governor makes within the range of that authority have all the weight which can be attributed to state action, and they must be viewed in the light of the object to which they may properly be addressed and with full recognition of its importance. It is with appreciation of the gravity of such an issue that the governing principles have been declared.
>
> "By virtue of his duty to 'cause the laws to be faithfully executed,' the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive. That construction, this Court has said, 'in speaking of the power constitutionally conferred by the Congress upon the President to call the militia into actual service, 'necessarily results from the nature of the

power itself, and from the manifest object contemplated.' The power 'is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union.' *Martin v. Mott*, 12 Wheat. 19,29,30. Similar effect, for corresponding reasons, is ascribed to the exercise by the Governor of a State of his discretion in calling out its military forces to suppress insurrection and disorder. *Luther v. Borden*, 7 How. 1, 45; *Moyer v. Peabody*, 212 U.S. 78, 83." *Sterling v. Constantin*, 287 U.S. 378, 399 (1932).

Recently the Fourth Circuit provided some of the practical logic for our decision on this point:

> "The responsibility for maintaining public peace on a day-to-day basis is lodged with the executive branch of government. As we recently have become all too painfully aware, public peace in our cities may be suddenly breached by massive civil disorder. Dealing with such an emergency situation requires an immediacy of action that is not possible for judges. We think it would be highly inappropriate for us, removed from the primary responsibility for maintaining order and with the benefit of time for reflection not available to the mayor, to substitute our judgment of necessity for his." *United States v. Chalk*, 441 F.2d 1278 (4th Cir. 1971).

II The Alleged Continuing Threats to Constitutional Rights

As to the second cause of action sought to be pled, we quote in full the relevant language from the complaint:

> "On May 4, 1970, members of the Ohio National Guard fired their guns into a crowd of persons on the Kent State University main campus, injuring several students and killing four. The culpable and legally unjustified shooting of unarmed civilians by Ohio National Guard troops deprived such persons of life and liberty without due process of law.
>
> * * *

"(b) Defendants *failed to adequately provide* Ohio National Guard troops with *specialized training* in control of civilian disorders or to *provide them,* when assigned to the Kent campus, *with adequate equipment* for dealing with civilian disorders by means other than the use of deadly force when such equipment, better adapted for dealing with civilian disorders than that utilized by the Ohio National Guard troops at the Kent campus, was available. Defendants also caused and ordered Ohio National Guard troops to carry live bullets ready for firing in their guns when on duty in and about the Kent campus. The use of inadequately trained troops, their lack of equipment adapted for control of civilian disorders, and the use by Ohio National Guard troops of guns loaded with live bullets to control civilian disorders substantially increased the risk of the injuries and killings which occurred and, therefore, the deprivations of life and liberty without due process of law which occurred on May 4, 1970. This risk remains and constitutes a real threat to plaintiffs and other students of further deprivations of life and liberty without due process of law. Defendants continue to inadequately train Ohio National Guard troops for civilian disorder control, continue to fail to equip them with adequate equipment for dealing with civilian disorders and to cause and order them to carry live bullets loaded in their guns while on duty during civilian disorders. In addition, defendants have failed to instruct and order Ohio National Guard troops to limit their use of deadly force during civilian disorders to those instances in which deadly force could lawfully be used by police officers.

"(c) Defendants permitted and caused Ohio National Guard troops to (1) engage in *unlawful and unjustified beatings* of students in and around the Kent campus. Beatings were administered to some students by Ohio National Guard troops, in part as a result of the exercise of the rights of speech and assembly by students who were beaten, and others. Defendants also permitted and caused Ohio National Guard troops *to unlawfully detain, and cause to be detained,* students, some as a result of the exercise by such students, and others, of the rights of speech and assembly. These actions of defendants, and

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their agents, have deprived persons of liberty without due process of law constituted a direct punishment without due process of law for the exercise of rights protected by the First and Fourteenth Amendments to the United States Constitution. Because of the past actions of defendants' agents and defendants' continued excessive use of Ohio National Guard troops to displace civilian authority during campus disorders, there remains a very real threat that plaintiffs and other students will be subjected to similar beatings and detentions in the future and thereby be deprived of the same rights. The threat of such punishment for exercise of rights protected by the First and Fourteenth Amendments inhibits and intimidates plaintiffs and other students in their exercise of such rights.

"(d) Defendants caused and ordered Ohio National Guard troops to *break up lawful and peaceable meetings*, demonstrations and assemblies in and about the Kent campus and thereby deprived plaintiffs and other students of their rights of speech, assembly, association and petition of government. The meetings, demonstrations and assemblies broken up were, in part, protesting against the occupation of the campus by a military force. Defendants' actions violated the First and Fourteenth Amendments to the United States Constitution and substantially increased the risk of the unjustified killings and injuries which occurred on the Kent campus of May 4, 1970. They were not legitimatized by the application of concepts of Martial Law, because there was neither an invasion nor breakdown of civilian authority. Moreover, to the extent that any provision of Ohio law either authorize the imposition of Martial Law except during time of invasion or breakdown of civil authority, or authorize a suspension of First Amendment rights as a consequence of the declaration of Martial Law, lawful or otherwise, they violate the First and Fourteenth Amendments to the United States Constitution. Defendants' past action in ordering Ohio National Guard troops to break up lawful assemblies creates a real threat to plaintiffs and other students that, if they participate in lawful activities they will be assaulted, killed, injured or unlawfully detained by Ohio National Guard troops"[1]

[1] In relation to these portions of the pleading, *cf. Prevention and Control of Mobs and Riots*, Federal Bureau of Investigation, U.S. Dept. of Justice, J. Edgar Hoover, 89-91 (1967), quoted in Appendix to this opinion. It is recognized that the policies outlined may set standards higher than those imposed by the Constitution.

The question which we think these paragraphs serve to pose, when the complaint is read with the fair inferences which may be deduced from it, is this: *Was there and is there a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that nonlethal force would suffice to restore order and the use of lethal force is not reasonably necessary?*

A citizen complaint that state action threatens federally protected rights is, of course, cognizable in the federal courts under the due process clause of the Fourteenth Amendment:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law."

In *Sterling* v. *Constantin*, 287 U.S. 378 (1932), the same case we have previously relied upon in affirming dismissal of the first phase of this case, the Supreme Court affirmed a federal District Court's injunctive relief against the Governor of Texas and other state officials who under claim of military necessity had taken over control of privately owned oil fields. The Supreme Court there held:

> "When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the federal judicial power extends (Art. III, § 2) and, so extending, the court has all the authority appropriate to its exercise. Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the federal question, the court may, and should, analyze the facts. Even when the case comes to this Court from a state court this duty must be performed as a necessary incident to a decision upon the claim of denial of federal right. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U.S. 573, 591; *Creswill* v. *Knights of*

Pythias, 225 U.S. 246, 261; *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U.S. 585, 593; *Union Pacific R. Co.* v. *Public Service Commn.,* 248 U.S. 67, 69; *Merchants National Bank* v. *Richmond,* 256 U.S. 635,638; *First National Bank* v. *Hartford,* 273 U.S. 548, 552, 553; *Fiske* v. *Kansas,* 274 U.S. 380,385,386." *Sterling* v. *Constantin, supra* at 398.

In another important case the Supreme Court affirmed a federal District Court's order, entered in the very midst of war, restoring the authority of the civilian courts of the territory of Hawaii as to nonmilitary criminal cases. *Duncan* v. *Kahanamoku,* 327 U.S. 304 (1946).

Even more obvious recognition of federal judicial power to vindicate federal Constitutional rights claimed to be abused by state power is found in recent cases in United States Courts of Appeals. *Lankford* v. *Gelston,* 364 F.2d 297 (4th Cir. 1966); *Build of Buffalo, Inc.* v. *Sedita,* 441 F.2d 254 (2d Cir. 1971).

In a recent decision the United States District Court for the Middle District of Kentucky has conducted a full hearing on somewhat similar complaints pertaining to state actions concerning disorders on the campus of the University of Kentucky. The complaint therein was dismissed after a hearing on the facts and this court has affirmed that decision. *Bright* v. *Nunn,* 448 F.2d 245 (6th Cir. 1971).

The partial dissent in this case relies basically on a form of abstention usually referred to as the political question doctrine. At the height of its influence in the federal courts, it caused the courts to abstain from adjudicating many asserted federal constitutional violations in fields as widely diverse as voting rights and the rights of prisoners in correctional institutions. The diminished vitality of the political question doctrine is specifically illustrated in such voting rights cases as *Reynolds* v. *Sims,* 377 U.S. 533 (1964), and *Baker* v. *Carr,* 369 U.S. 186 (1962), and in such prisoner rights cases as *Haines* v. *Kerner,* –U.S. –(1972) (Decided Jan. 13, 1972), and *Gonzales* v. *Rockefeller,* –F.2d–(2d Cir. 1971) (Decided Dec. 1, 1971).

It is worth emphasizing that the *Haines* case came down on January 13, 1972, from a unanimous Supreme Court.

There is a hint in the dissent that perhaps the Constitution

conveys to the Executive and to Congress such powers over the military forces as to exclude any form of judicial review. No express language of the Constitution may be found which even arguably supports such a proposition when it is applied to the use of military force in domestic affairs. Cases we have cited previously (*Duncan* v. *Kahanamoku, supra; Sterling* v. *Constantin, supra; Ex parte Milligan, supra*) stand in flat contradiction to this proposition. *See also Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952).

Obviously, if the control of ultimate force were in the hands of the Executive alone, constitutional government in our democracy would rest entirely upon the will (and whim) of one man.

The final point made by the dissent is that there is no conceivable form of relief which the District Court could have rendered. Far more applications for injunctive relief are filed, heard and denied on the merits in the federal courts than are ever granted, and such, of course, may well prove to be the case when the issues here sought to be presented are actually the subject of proofs. Nonetheless, the right to be heard is itself a constitutional right of vital importance.

Further, if the District Court after evidentiary hearing were to find from the facts developed before it that an affirmative answer should be made to the summary question previously phrased in this opinion, we have no doubt that the District Court will find much material available for devising a suitable remedy. *See,* for example: *Prevention and Control of Mobs and Riots,* Federal Bureau of Investigation, U.S. Dept. of Justice, J. Edgar Hoover (1967) (See Appendix to this opinion.); 32 C. F. R. § 501(1971), "Employment of Troops in Aid of Civil Authorities"; *Instructions for Members of the Force at Mass Demonstrations,* Police Department, City of New York (no date); Report of the National Advisory Commission on Civil Disorders (1968).

As to further speculation on the form of relief, we follow the Supreme Court admonition in *Baker* v. *Carr, supra:*

> "Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if

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violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial." Baker v. *Carr, supra* at 198.

As to this phase of this complaint, the case is remanded for further proceedings consistent with this opinion.

III The Attack on the Constitutionality of Ohio Rev. Code § 2923.55

The third cause of action upon which plaintiffs sought adjudication was, we believe, properly dismissed below.

The relief sought concerning the statute was a declaratory judgment and no injunctive relief as to this issue was prayed for.

The statute attacked has never been construed by the appellate courts of Ohio. Viewing the statute on its face, we perceive no substantial federal constitutional issue.

The statute reads:

"**§ 2923.55 Death or injury of rioter by use of necessary force.**

Police officers, special police officers, sheriffs, deputy sheriffs, highway patrolmen, other law enforcement officers, members of the organized militia, members of the armed forces of the United States, and firemen, when engaged in suppressing a riot or in dispersing or apprehending rioters and after an order to desist and disperse has been issued pursuant to section 2923.5l of the Revised Code, are guiltless for killing, maiming, or injuring a rioter as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend rioters. This section does not relieve a member of the organized militia or armed forces of the United States from prosecution by court-martial for a military offense." *Ohio Rev. Code* § 2923.55 (Supp. 1969).

What this language purports to do is to grant immunity to policemen, firemen and members of the armed forces from prosecution for killing, maiming or injuring a rioter riot "as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend riot-

ers." On its face before the immunity came into existence, this statute would seem to call for proofs that a riot existed, that there had been an order to desist and disperse which had been defied, and that force had been required to suppress the riot. The statute might be argued to grant immunity from prosecution as a result of the use of lethal force against "rioters" where the circumstances above were present; but this immunity would only come into being where the use of such lethal force was "necessary and proper." The necessary and proper language appears to us (as apparently it did to the District Judge) to be an approximation of the reasonable cause standard of the common law applicable to the use of fatal force. *Schweder* v. *Baratko,* 103 Ohio App. 399 (1957); *Skinner* v. *Brooks,* 74 Ohio App. 288 (1944); 6 C.J.S. *Arrest* §13a. at 612 (1937).

If it be contended that contrary to the construction above this statute has been construed by the Ohio National Guard as authorizing the use of fatal force, even if under the circumstances lesser force would serve to restore order, such proofs would be admissible under the second issue as to which we are remanding this case, and appropriate relief could be granted thereunder.

It remains, of course, to be determined in the District Court under Rule 23 and 23.(2) of the Federal Rules of Civil Procedure whether or not plaintiffs are appropriate representatives of the class they purport to represent and whether or not, as appellees contend, the United States is a necessary party to this suit.

Reversed and remanded for further proceedings in accordance with this opinion.

APPENDIX

V. EMPLOYMENT AND APPLICATION OF FORCE

The basic rule, when applying force, is to use only the minimum force necessary to effectively control the situation. Unwarranted application of force will incite the mob to further violence, as well as kindle seeds of resentment for police that, in

turn, could cause a riot to recur. Ill-advised or excessive application of force will not only result in charges of police brutality, but also may prolong the disturbance. The major portion of persons constituting a mob may be law-abiding citizens who have been driven or led to participate in a lawless act because of their belief in a cause.

For many, the mere appearance (Show of Force) of police who represent law and order will be sufficient to bring them to their senses and they will obey the order to leave peaceably. The application of force by degrees will, in turn, cause more to realize their error and they, too, will depart. Applying force by degrees insures that the maximum force employed to restore order was applied to the most violent and lawless individuals only. *The degrees and the order of the application of force should be decided in advance of the operation, and preferably included in the plan. All officers involved in the operation must be aware of these degrees and must know when each is to be applied and by whose authority. This is not meant to imply that police should not meet force with greater force; it does mean that unnecessary bloodshed must be avoided whenever possible.*

Within the military establishment, the following is the priority or sequence of force applied:

1. Unload rifles with bayonets fixed and sheathed.
2. Unload rifles with bare bayonets fixed.
3. Tear Gas (CS & CN)
4. Loaded rifles with bare bayonets fixed.

A similar priority of force should be decided by each police agency, based upon the weapons and equipment available to that department for use in riot control duty.

There are numerous items of equipment available to the police for use in controlling riots. The following is a discussion and analysis of some of the more common items and techniques:

A. Firearms

The most extreme action which a law enforcement officer can take in any situation is the use of firearms. Under no

circumstances should firearms be used until all other measures for controlling the violence have been exhausted. Above all, officers should never fire indiscriminately into a crowd or mob. Such extreme action may result in injury or death to innocent citizens and may erupt into a prolonged and fatal clash between the officers and the mob. The decision to resort to the use of firearms is indeed a grave one. Such a decision must be based upon a realistic evaluation of the existing circumstances. Among the important considerations, of course, are the protection of the officer's own life, as well as the lives of fellow officers, and the protection of innocent citizens. A basic rule in police firearms training is that a firearm is used only in self-defense or to protect the lives of others.

The firing of weapons over the heads of the mob as a warning is objectionable. In addition to the possibility of injuring innocent persons by ricocheted bullets or poorly aimed shots, the firing may only incite the mob to further violence, either through fear or anger. At best, this is a bluffing tactic and a basic rule when dealing with a mob is NEVER BLUFF.

The possibility of receiving sniper fire cannot be overlooked. A sniper must be dealt with rapidly and severely. If permitted to operate, a sniper will not only pin down the police force but will remain a threat to human life–both police and citizens. To effectively handle a sniper, it may be necessary to employ a countersniper, equipped and trained in the use of high-powered, telescopic-equipped rifles. Police officers, crouched behind any means of protection available and firing their service revolvers or shotguns aimlessly at a building or rooftop,are endangering lives and, at the same time, are prevented from accomplishing their mission.

B. Bayonets

The mere presence of a bayonet in the hands of an officer has a deterrent effect. This does not mean that a bayonet should be used as a night stick or baton; if used, it should be a part of the weapon and is appropriate for use with the standard shotgun. If a special unit, such as the Riot Squad, is to be used and is equipped with shotguns, the bayonet is effective in the Show of

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Force and when engaged in the standard riot control formations.

C. Fire Hoses

Water from fire hoses may be effective in moving small groups, in moving groups on a narrow front, or in defending a defile or roadblock. Water has been used in the recent and past and has a psychological, as well as a physical effect. Water may be employed in two ways; as a flat trajectory weapon utilizing pressure, or as a high trajectory weapon akin to heavy rainfall. The latter method is especially effective during cold weather. If water is used in such ways, a harmless dye can be mixed into the stream for possible later identification of the rioters. Employed as a flat trajectory weapon, utilizing the pressure to physically move individuals, serious injury or death can result. The decision to employ water, in one or both methods, should be arrived at during the planning phase and should be based on the discretion of police and community officials.

D. Dogs

Some police departments have found that dogs are an asset in police work. Dogs also serve to protect the officer. However, both the dogs and handlers must be well trained and disciplined. Use of dogs to confront the demonstrators has sometimes produced resentment and ill feeling on the part of the public in general. Dogs can be employed effectively at roadblocks and by foot patrols operating in an area previously cleared of rioters. However, as a general rule, dogs should not be used when confronting the mob, particularly during the Show of Force phase when their presence could serve to furnish the spark that would ignite the riot.

E. Horses

As with dogs, use of horses, on some occasions, has resulted in ill feeling on the part of the public. However, horses may be effectively employed on the periphery to control spectators and prevent their entry into the troubled area. If a situation has

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seriously deteriorated and it is necessary to eject leaders from the midst of the mob, horses employed in a diamond formation may be used to escort the arresting officers through the mob and to provide security for them during their return to police lines. Horses may also be used effectively in blocking positions to control the movement of the mob. Under no circumstances should horses be used to "charge" the mob.

F. Batons

The baton is an adaptable instrument which can be used as an offensive or defensive weapon. It must, however, be used properly and judiciously to obtain the desired results and, at the same time, avoid criticism of the police officer and the agency he represents. When facing a crowd or mob, the baton should be held with both hands, the palm of the right hand down and the palm of the left hand up with the hands close to the ends. The baton should be used only in an emergency, and when blows are struck, it should be with the intention of stunning or temporarily disabling, rather than inflicting injury. Blows to the head should be avoided. The baton used as an extension of the arm is generally more effective than when used as a bludgeon, or club. Officers equipped with the baton must be thoroughly trained in unison as a unit or team.

G. Chemical Agents

Law enforcement agencies have two objectives when using chemical agents in riot control situations. The first is to prevent violence by the rioting group, and the second is to disperse the crowd with minimum hazard to the individuals in the mob and to the officers engaged in the operation. Prior to the use of chemical agents, it must be established that the mob has an avenue of escape; if not, panic could result. Chemical agents, properly employed, provide the police commander with a distinct advantage; they can negate the numerical superiority the mob has over the police force. They are the most effective and most humane means of achieving temporary neutralization of a mob with a minimum of personal injury. Chemical agents

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should not be used or threatened to disperse demonstrators who are not in fact endangering public safety and security. (Emphasis added.) *Prevention and Control of Mobs and Riots,* Federal Bureau of Investigation, U.S. Dept. of Justice, J. Edgar Hoover, 89-91 (1967).

CELEBREZZE, Circuit Judge (concurring in part and dissenting in part).

I concur with the majority in their affirmance of the District Court with respect to the first and third causes of action as described above. I respectfully dissent, however, from the majority's decision to reverse the District Court's dismissal of the second cause of action.

As it has been liberally construed by the majority, the second cause of action challenges the training, weaponry, and orders of the Ohio National Guard which allegedly make inevitable the unnecessary use of lethal and nonlethal force in controlling civil disorders. This pattern of training, weaponry, and orders is said to have caused the allegedly unwarranted use of both lethal and nonlethal force on the Kent State campus in May of 1970, in deprivation of the First and Fourteenth Amendment rights of Appellants and others similarly situated, and it poses a continuing threat to their present and future exercise of those rights. To remedy this asserted threat to their constitutional rights, Appellants seek broad injunctive and declaratory relief against the Governor of Ohio and Ohio National Guard officials to prevent a recurrence of the allegedly unwarranted use of force which is said to have taken place in May of 1970.

I disagree wtih the majority's conclusion that the District Court erred in dismissing this portion of the complaint as failing to state a claim upon which relief could be granted. I find no conceivable relief which the District Court could have granted had it proceeded to hear evidence in support of these claims and determined that all of the facts alleged were true. In this respect, I recognize that "[t]he question of the propriety of remedies prayed for by plaintiffs...is not an issue on this appeal." *Build of Buffalo, Inc.* v. *Sedita,* 441 F.2d 284, 288 (2d

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Cir. 1971). However, the question of whether there exists *any* conceivable form of relief which the District Court could have granted in response to Appellants' claims certainly is an issue on this appeal.

With respect to the injunctive relief which is sought to cure the alleged threat posed by the pattern of training and weaponry of the Ohio National Guard, I am unable to escape the conclusion that any such relief would present a nonjusticiable political question. The Supreme Court's most recent and thorough discussion of the political question doctrine appears in *Baker* v. *Carr*, 369 U.S. 186, 208-26 (1962). There the Supreme Court set forth the following characteristics of nonjusticiable political questions:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217.

In considering whether the voting rights asserted in *Baker* V. *Carr* constituted nonjusticiable political questions, the Supreme Court noted that "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence." *Id.*

In the present case, I believe that every one of the above

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formulations is "inextricable" from the second cause of action to the extent that it requires judicial intervention in National Guard training and weaponry. I find a "textually demonstrable constitutional commitment" of National Guard training and weaponry to a coordinate political department under Article I, Section 8, Clause 16, of the United States Constitution, which provides that Congress shall have the power

> "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

Pursuant to this constitutional authority, Congress has enacted legislation which governs the training and weaponry of the National Guard. 32 U.S.C. §§501-07,701. Moreover, Congress has expressly provided that

> "The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard." 32 U.S.C. §110.

And under 32 U.S.C. §108, the President has available the following means by which to enforce any regulations which he or the Congress may prescribe for the National Guard:

> "If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law."[1]

---

[1] The potential effectiveness of this sanction is evidenced by the fact that "[t]he Federal Government pays for 90 percent of the operating costs, virtually all of the equipment, and nearly half of the cost of the physical installations and facilities" of the National Guard. *Report of the National Advisory Commission on Civil Disorders* at 498 (Bantam ed. 1968).

This power to prescribe and enforce regulations for the training and weaponry of the National Guard, which Congress has delegated in part to the President, is more than a mere token and unexercised authority. In July of 1967, when civil disorders had come to the forefront of national concern, President Johnson announced that he had ordered the addition of special training courses to the existing National Guard training program. *Weekly Compilation of Presidential Documents,* Vol. 3, No. 30, at 1056 (1967). Moreover, under the authority delegated to the President, the Department of the Army has specifically set mandatory riot-control training requirements for all Army National Guard and certain Air National Guard units. *See Report of the National Advisory Commission on Civil Disorders, supra,* at 505.

I believe that the congressional and executive authority to prescribe and regulate the training and weaponry of the National Guard, as set forth above, clearly precludes any form of judicial regulation of the same matters. I can envision no form of judicial relief which, if directed at the training and weaponry of the National Guard, would not involve a serious conflict with a

> "coordinate political department;...a lack of judicially discoverable and manageable standards for resolving [the question];...the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;...the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;...an unusual need for unquestioning adherence to a political decision already made; [and] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker* v. *Carr, supra,* 369 U.S. at 217.

Any such relief, whether it prescribed standards of training and weaponry or simply ordered compliance with the standards set by Congress and/or the Executive, would necessarily draw the courts into a nonjusticiable political question, over which we have no jurisdiction.

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The question remains whether, upon the claims stated in the second portion of the complaint, the District Court could have granted any injunctive relief which would not have entailed judicial involvement in the training and weaponry of the National Guard. The majority relies heavily on *Sterling v. Constantin*, 287 U.S. 378 (1932), *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966), and *Build of Buffalo, Inc. v. Sedita*, 441 F.2d 284 (2d Cir. 1971), apparently for the proposition that injunctive relief might be available against specific conduct by the Ohio National Guard which threatens Appellants' constitutional rights. Any such injunctive relief directed at specific unlawful conduct of the National Guard, apart from the training and weaponry of the Guard, would seemingly avoid the political question problem discussed above. Nonetheless, I believe that any such injunctive relief is unavailable to Appellants in response to the claims in their second cause of action.

In *Sterling v. Constantin, supra*, the conduct and specific acts of the National Guard in response to civil disorders were not at issue. As the Supreme Court noted:

> "Fundamentally, the question here is not of the power of the Governor to proclaim that a state of insurrection, or tumult, or riot, or breach of the peace exists, and that it is necessary to call military force to the aid of the civil power. Nor does the question relate to the quelling of disturbances and the overcoming of unlawful resistance to civil authority. The question before us is simply with respect to the Governor's attempt to regulate by executive order the lawful use of complainants' properties in the production of oil." 287 U.S. at 401-02.

That the *Sterling* decision did not authorize federal courts to grant injunctions against the future conduct of the National Guard in the face of civil disorders is further evidenced by the Supreme Court's recognition of the discretion which must be employed in such emergency situations:

> "The nature of the power [of a governor to call out the militia to suppress insurrection and disorder] also necessarily implies that there is a permitted range of honest

judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace." 287 U.S. at 399-400.

As the majority notes, the complaint concedes that when the Ohio National Guard troops were deployed to the Kent State campus in May of 1970, there existed disorders which had not been brought under control by the civilian authorities. Therefore, any injunctive relief which the District Court might have granted to curb certain conduct of the Guard troops would have restricted the discretion which the Governor and the National Guard officials must be free to exercise in the face of future disorders.

I am not suggesting that in a proper case, federal courts are barred from undertaking an after-the-fact review of National Guard conduct which has allegedly deprived persons of their constitutional rights. Nor am I suggesting that National Guard troops could never be the subject of some form of injunctive restraint in their conduct in quelling civil disorders. Rather, I simply believe that such an injunction cannot be issued when the future conduct to be restrained – such as the Ohio National Guard's allegedly unlawful disruption of speeches and assemblies, arrests, and use of nonlethal and lethal force which are challenged here – necessarily rests upon the exercise of discretion by state officials in response to a given civil disorder. In this respect, I believe that *Lankford v. Gelston* and *Build of Buffalo, Inc. v. Sedita, supra,* are clearly distinguishable from the present case. In *Lankford,* the Court of Appeals for the Fourth Circuit issued an injunction against the Baltimore Police Department, barring its personnel from conducting searches of private dwellings solely on the basis of anonymous tips and hence without probable cause. And in *Sedita,* the Court of Appeals for the Second Circuit simply recognized that some

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form of injunctive relief might be issued if the plaintiffs could prove their allegations that the Buffalo city officials and the Buffalo Police Department had engaged in or condoned a systematic pattern of abusive conduct designed to deprive plaintiffs of their constitutional rights. The types of state action which were challenged in these cases were unlawful on their face; neither type of conduct could have been justified under a valid exercise of discretion by state or city officials. Were any of the conduct challenged in the present complaint the type which could never be justified in the quelling of civil disorders, I am certain that injunctive relief should similarly be available to prevent its recurrence.

The conduct challenged in the present complaint, however is not illegal and unjustified on its face. Rather, the legality of, and the justification for, the conduct challenged here necessarily rest upon the conditions which prevail at a given civil disorder. I can envision no form of injunctive relief which could properly predetermine the conditions of civil disorder under which speeches and assemblies shall and shall not be disrupted, arrests shall and shall not be made, and lethal and nonlethal force shall and shall not be employed.

I therefore believe that the District Court was powerless to issue any type of an injunction directed at the specific conduct of the Ohio National Guard which is challenged in the complaint. No less than an injunction prescribing prerequisites for the Governor's calling out the National Guard, an injunction forbidding or restricting the discretionary conduct challenged in the complaint would operate as an impermissible prior restraint on the state officials' judgment in the face of future civil disorders.

There thus being no injunctive relief which, in my opinion, the District Court could have granted in response to Appellants' second cause of action, only the declaratory judgment prayed for in the complaint remains to be considered. As discussed above in the context of injunctive relief, I believe the political question doctrine would similarly bar any form of declaratory judgment relating to the training and weaponry of the Ohio National Guard.

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The only other conceivable form of declaratory judgment, apart from that relating to the training and weaponry of the National Guard, would be a judgment determining the legality of the specifically challenged conduct of the Ohio National Guard on the Kent State campus in May of 1970. I believe it is clear from the complaint, however, that the legality of the specific conduct of the National Guard troops on the Kent State campus in May of 1970 was not properly before the District Court as an "actual controversy" warranting a declaratory judgment under 28 U.S.C. § 2201. The thrust of the claim asserted in the complaint is the present threat which the continuing pattern of training, weaponry, and orders of the Ohio National Guard poses to Appellants' First and Fourteenth Amendment rights. Indeed, the complaint characterizes the Plaintiffs and other members of the class which they represent as students enrolled in Kent State University at the time the complaint was filed on October 15, 1970. Nowhere does the complaint allege that the named Plaintiffs or other members of the class were in fact the direct subjects of the alleged disruptions of speeches and assemblies, arrests, or use of nonlethal and lethal force in May of 1970 or that they were even enrolled in the University at the time of those disorders. Therefore, although the conduct of the National Guard in May of 1970 may have served as evidence of the alleged threat to Appellants' constitutional rights, I do not believe that it constituted a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" by the District Court under the present complaint. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969), quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

I thus am of the opinion that no conceivable form of injunctive or declaratory relief could have been granted by the District Court in response to the claims asserted under the second cause of action. My conclusion is in no way altered by this Court's decision in *Bright v. Nunn*, 448 F.2d 245 (6th Cir. 1971). Although the plaintiffs in *Bright* sought declaratory and injunctive relief similar to that prayed for in the present com-

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laint, it is apparent that the availability of relief was not onsidered in the *Bright decision.*

I also disagree with the majority's position that "[a] com-laint that state action *threatens* federally protected rights is, of ourse, cognizable in the federal courts . . . (my emphasis). I elieve this conclusion and the result reached thereunder ignore he numerous cases which clearly establish that a threat to, or chilling effect" upon, a citizen's constitutional rights does not utomatically constitute a justiciable case or controversy for the ederal courts. As noted by the Court of Appeals for the istrict of Columbia Circuit, not "every plaintiff who alleges a irst Amendment chilling effect and shivers in court has there-y established a case or controversy." *National Student Associ-ion v. Hershey,* 412 F.2d 1103, 1113-14 (D.C. Cir. 1969). ven those cases which have liberally recognized claims of a chilling effect" appear to raise serious questions as to whether he alleged threat to Appellants' constitutional rights in the resent case is cognizable as a justiciable case or controversy. ee, *e.g., National Student Association v. Hershey,* 412 F.2d 103 (D.C. Cir. 1969); *Tatum v. Laird,* 444 F.2d 947 (D.C. Cir. 971). *Compare Younger v. Harris,* 401 U.S. 37, 42 (1971); olden *v. Zwickler,* 394 U.S. 103 (1969). Being of the opinion at no relief could be granted in response to the present mplaint if it does indeed present a justiciable case or contro-rsy, I find it unnecessary to resolve this more complex ques-on.

For the reasons set forth above, I would affirm the District ourt in its dismissal of all causes of action asserted in the mplaint.

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In the

Supreme Court of the United States

October Term, 1971

No. 71-1553

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

John J. Gilligan, Governor of Ohio,
Dana L. Stewart, Adjutant General of Ohio,

—and—

Robert H. Canterbury, Assistant Adjutant General,
Petitioners,

—against—

Craig Morgan, Thom Dickerson,

—and—

William Slocum,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1553

JOHN J. GILLIGAN, Governor of Ohio,
DANA L. STEWART, Adjutant General of Ohio,

—and—

ROBERT H. CANTERBURY, Assistant Adjutant General,

Petitioners,

—against—

CRAIG MORGAN, THOM DICKERSON,

—and—

WILLIAM SLOCUM,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Opinion Below

The opinion of the Court of Appeals is reported at 456 F.2d 608, as *Morgan* v. *Rhodes*.

Counterstatement of Questions Presented

1. Whether the majority of the Court of Appeals erred in reversing the District Court's dismissal of the complaint when it concluded that the complaint alleged deprivations

of constitutional rights and that, if the allegations were proved, some form of relief might be appropriate.

2. Whether the political question doctrine precluded a Court of the United States from inquiring into conduct of the National Guard of a State, including the question whether conduct of the National Guard, its officers or its supervisors, has deprived persons of rights, privileges, and immunities secured by the United States Constitution.

Counterstatement of the Case

It is the position of Respondents that the opinion of Judge Edwards for the majority of the Court of Appeals adequately and effectively summarizes the allegations of the complaint and correctly isolates the issues. The Court's opinion quotes the pertinent portions of the complaint.

REASONS FOR DENYING THE WRIT

This action results from a major event in recent American history. On May 4, 1970, Ohio National Guard troops fired into a crowd of students and young persons on the campus of Kent State University, killing four and wounding several others. Not long afterward, the plaintiffs, students of Kent State University, filed this class action, alleging constitutional deprivations of the most serious magnitude and seeking injunctive and declaratory relief for the purpose of assuring that such an event does not occur again. In substance the complaint alleges that the shootings on the Kent State University campus were the result of a series of unconstitutional practices and that such practices and their result deprived the persons killed

and injured of life and liberty without due process of law and threatened the same to other members of the class. *Screws* v. *United States,* 325 U.S. 91 (1945). The action is premised on the capacity of a United States District Court, acting as a court of equity, under Title 42, United States Code, Section 1983, to grant relief to prevent further deprivations of constitutional rights. Nevertheless, the District Court dismissed the complaint without opinion, thereby holding that the federal courts are closed to litigants seeking the most basic kind of relief.

If this case were coming before this Court in that context, it would be eminently suited for the issuance of a writ of certiorari. Such a decision would have conflicted with the long established rule that a complaint should not be dismissed unless no set of facts could be proved warranting some relief. See, e.g., *Jenkins* v. *McKeithen,* 395 U.S. 411 (1969); *Conley* v. *Gibson,* 355 U.S. 41 (1957). It would also have extended the political question doctrine (if that were the ground of decision) to an area in which it had never been applied—relations between the federal judiciary and the states. See *Baker* v. *Carr,* 369 U.S. 186 (1962). Moreover, the District Court had denied a judicial forum in a case of great public importance.

But that is not the context of the petition. The Court of Appeals reversed the District Court, as it had to, rendering the case quite inappropriate for issuance of a writ of certiorari. In its present context, this case merely reiterates a long-standing interpretation of the Federal Rules of Civil Procedure. There is no conflict between the decision of the Sixth Circuit and those of the other Circuits. And the decision of the Court of Appeals—unlike the decision of the District Court—was not novel although

it was important. It was merely a correct application of procedural law.

Moreover, it was a decision of an interlocutory nature, remanding the case to the district court for further proceedings. Any issues, other than the simple conclusion that the complaint states a claim for relief, can return to this Court within a factual record if this case proceeds, as it should, to resolution after trial. As it has in the past, this Court should deny the writ because the case is neither final nor ripe for Supreme Court consideration. See, e.g., *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *United States*, 240 U.S. 251, 258 (1916); *R. Stern and E. Gressman*, Supreme Court Practice 180 (4th ed. 1969).

Similarly, the "Political Question" contention offered by petitioners does not warrant issuance of the writ consistently with the criteria normally applied by this Court. The Court of Appeals' rejection of the suggestion that the political question doctrine immunizes National Guard conduct from judicial inquiry conflicts neither with decisions of this Court nor of other Circuits. In fact, the Court of Appeals' conclusion is a direct consequence of this Court's holding in *Baker* v. *Carr*, 369 U.S. 186 (1962), that the political question doctrine deals with "the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States . . ." 369 U.S. at 210. See also 369 U.S. at 218, 226. And, of course, this Court long ago established the principle that civilian courts could inquire into the lawfulness of conduct of the armed forces and the militia. See, e.g., *Duncan* v. *Kahanamaku*, 327 U.S.

304 (1946); *Sterling* v. *Constantin*, 287 U.S. 378 (1932); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

An additional point of importance in connection with the claimed application of the political question doctrine to this case is that such a claim was never made in the District Court. The motion to dismiss proceeded on the ground that the State of Ohio was voluntarily in the process of seeking non-lethal weapons for its National Guard troops, on the ground that the United States was an indispensable party, and on the ground (not in issue on this petition) that an order enjoining premature use of National Guard troops would be an unwarranted interference with state government. Applicability of the political question doctrine to this case was not suggested until appeal.

CONCLUSION

There is no necessity at this stage of this case for issuance of a writ of certiorari. On the contrary, the interests of justice would best be served by permitting this case to proceed to trial as quickly as possible. Thereafter, remaining issues of moment may be considered by this Court. The petition should therefore be denied.

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In the
Supreme Court of the United States

October Term, 1972

No. 71-1553

JOHN J. GILLIGAN,
Governor of Ohio,
DANA L. STEWART,
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ROBERT H. CANTERBURY,
Assistant Adjutant General,
Petitioners,

v.

CRAIG MORGAN,
THOM DICKERSON,
WILLIAM SLOCUM,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM OF PETITIONERS SUGGESTING A QUESTION OF MOOTNESS

Petitioners believe that there is a continuing live controversy between the parties to this action. However, certain matters have occurred which may raise the question of mootness. Petitioners have been informed that it is their duty to bring these matters to the attention of the Court. Stern & Gressman, Supreme Court Practice 592 Sec. 18.2 (4th Ed. 1969).

case. Petitioners also submit that there is still a live controversy between the parties with respect to such issues. Petitioners therefore request that this Court find that this case is not moot. In the alternative, petitioners request that the portion of the judgment of the Court of Appeals which is presented for review be vacated and the case be remanded to the District Court with directions to dismiss this portion of the case as moot. See, e.g., *King* v. *Jones*, 405 U.S. 911 (1972).

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Supreme Court, U. S.
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BRIEF FOR THE PETITIONERS

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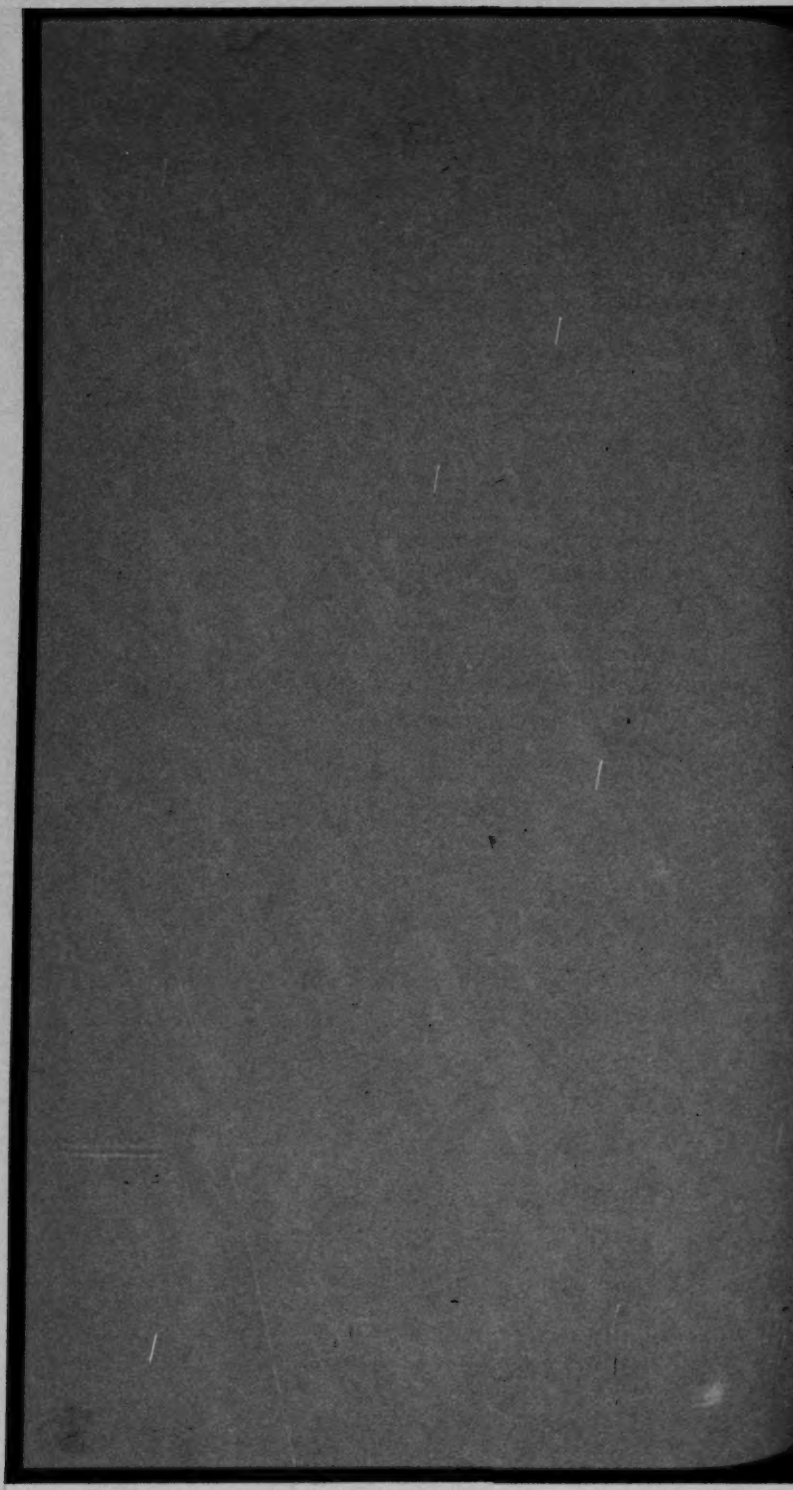
December 6, 1972

THE JUDGON-BROOKS COMPANY—CLEVELAND



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BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals is reported at 456 F 2d 608. This opinion is contained in the Petition for Writ of Certiorari filed herein.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 15, 1972. The petition for a writ of certiorari was filed within ninety days of that

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date and was granted October 24, 1972. This court's jurisdiction rests on 28 U.S.C. 1254(1).

The basis for jurisdiction in the first instance was 28 U.S.C. 1343(3).

QUESTIONS PRESENTED

1) Whether the issue of the proper training, weaponry and orders of members of an organized National Guard is nonjusticiable as a political question.

2) Whether injunctive relief controlling the training, weaponry and orders of the National Guard would violate the longstanding policy against interference by a federal court with the legitimate activities of a state.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article 1, Section 8, Clause 16:

The Congress shall have Power . . . To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

United States Code, Title 32:

Section 108. Forfeiture of Federal benefits.

If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.

Section 110. Regulations.

The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.

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Section 501. Training generally.

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

Section 701. Uniforms, arms, and equipment to be same as Army or Air Force.

So far as practicable, the same types of uniforms, arms, and equipment as are issued to the Army shall be issued to the Army National Guard, and the same types of uniforms, arms, and equipment as are issued to the Air Force shall be issued to the Air National Guard.

Ohio Revised Code.

Section 5923.22. Call of militia in case of riots or mobs.

When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities.

No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directed to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order isued in such case.

STATEMENT

On May 1, 1970, there occurred certain disorders in and about the area of Kent State University, in Kent, Ohio. These disorders had not been terminated by normal civilian controls. The Governor of Ohio on May 2, 1970, therefore ordered certain contingents of the Ohio National

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Guard to duty in and around the Kent campus to assist the local authorities in controlling the disorders.

Respondents, (herein referred to as plaintiffs) alleging that they were fulltime students and officers in student government at Kent State University, commenced this action on October 15, 1970 against James A. Rhodes, who was then Governor of Ohio; Sylvester DelCorso, who was then Adjutant General of Ohio; and Robert Canterbury, who was then an assistant to the Adjutant General. In substance, plaintiffs claimed that defendant Rhodes "prematurely" ordered the National Guard troops to duty; that the National Guard troops, while on duty, committed certain acts which deprived the students of rights guaranteed by the Constitution of the United States; and that Section 2923.55 of the Ohio Revised Code, which under certain, specified conditions grants immunity to National Guard troops, was unconstitutional. Plaintiffs also alleged that the actions and operating methods of the Ohio National Guard and the continuance of the same rules, procedures and operating methods under the supervision of the named defendants created a substantial threat of repetition of similar acts. Plaintiffs sought an injunction against defendant Rhodes and his successors in office from "prematurely" ordering the National Guard to duty on the Kent campus; an injunction against all defendants and their successors in office from ordering the National Guard to duty on the Kent campus unless they had been competently trained, had been provided with the best available nonlethal equipment, had been specifically ordered not to use deadly force, and had been ordered not to carry live ammunition. Plaintiffs also requested that Section 2923.55 of the Ohio Revised Code be declared unconstitutional.

The district court sustained the defendants' motion to dismiss, finding that the complaint failed to state a claim upon which relief could be granted.

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On appeal, the Court of Appeals for the Sixth Circuit affirmed the district court in its refusal to grant injunctive relief against the Governor "prematurely" calling out the National Guard. It also found that Section 2923.55 Revised Code on its face presented no substantial constitutional issue. However, the majority of the court interpreted the complaint to state the following issue:

> "Was there and is there a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that non-lethal force would suffice to restore order and the use of lethal force is not reasonably necessary?"

The cause was remanded to the district court for a hearing on this issue.

John J. Gilligan, Governor of Ohio and successor to James A. Rhodes in that office; and Dana L. Stewart, Adjutant General of Ohio and successor to Sylvester DelCorso in that office, filed a petition for a writ of certiorari to this court to review that portion of the judgment and opinion which remanded the cause to the district court. Plaintiffs took no action with respect to the remaining portions of the judgment.

SUMMARY OF ARGUMENT

Petitioners do not contend that the actions of the National Guard and its officials and members may never be subject to judicial review nor held responsible for their actions. Neither do they contend that conduct, which is illegal on its face and could never be justified as a valid exercise of discretion, may not be enjoined. However, these issues are not present in the instant case. The legality and propriety of the conduct complained of depends upon the conditions which prevailed on the Kent campus in May 1970. Any relief which controls the training, weap-

onry and orders of the National Guard and which restricts the discretion of officials, federal and state, who are responsible for such matters, must predetermine the conditions which will prevail and the measures which will be required to control them.

Petitioners contend that the propriety of the training, weaponry and orders of the National Guard presents a nonjusticiable political question. The Constitution commits the authority and responsibility to Congress. Any relief granted by the district court would express a lack of respect for the legislative and executive branches and could result in conflicting directions on the subject. In addition, there is a lack of judicially discoverable or manageable standards for resolving the issue.

Petitioners also contend that any relief which the district court could grant would constitute an undue interference with the ability of the state to preserve the peace and maintain order.

ARGUMENT

The Issue Of The Propriety Of The Training, Weaponry And Orders Of The National Guard Is A Non-Justiciable Political Question.

The judgment of the Court of Appeals rendered herein remanded the cause to the district court to determine whether injunctive relief should be granted to control the training, weaponry and orders of the Ohio National Guard. The applicable decisions of this Court establish that this issue is a non-justiciable political question.

The majority below dismissed this contention by stating that decisions of this Court in the areas of voting rights and prisoners' rights establish the "diminished vitality" of the political question doctrine. *Baker* v. *Carr*, 369 U.S. 186 (1962), is one of the cases relied upon by the

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Court of Appeals in support of this statement. That case involved a claim that the apportionment of the state legislature deprived the plaintiffs therein of the equal protection of the laws. This Court found that the claim therein did not involve a non-justiciable political question. However, the decision clearly did not abolish the political question doctrine. The majority opinion contains an extensive review of the previous decisions in this area and explains the factors which will present a political question.

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." (369 U.S. at 217)

Reynolds v. *Sims*, 377 U.S. 533 (1964) and *Haines* v. *Kerner*, 405 U.S. 519 (1972), the other two cases relied upon by the majority below, did not even discuss the political question doctrine.

The opinion and the cases reviewed in the *Baker case* indicate that the existence of any one of these factors may present a political question which will justify the dismissal of the action. Each of the factors are present in the instant case. There is a "textually demonstrable constitutional

commitment of the issue to a coordinate political department". Article I, Section 8, Clause 16, of the Constitution gives Congress the authority to prescribe the proper training, weaponry and discipline for the militia:

> "The Congress shall have Power . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

Pursuant to its constitutional authority, Congress has enacted legislation governing the training and weapons of the National Guard. Congress has provided that the training of the Army National Guard shall conform to the training of the Army. 32 U.S.C. 501. See also: 32 U.S.C. 502-507. It has also provided that the same types of arms and equipment shall be issued to the National Guard as are issued to the Army, 32 U.S.C. 701. In addition, Congress has authorized the President to prescribe regulations governing the National Guard.

> "The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard." 32 U.S.C. 110.

Congress has also given the President the means to enforce any regulation which he or Congress may prescribe.

> "If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law." 32 U.S.C. 108

Any relief which the district court could grant in the instant case would express a lack of respect for the execu-

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tive and legislative branches of the government. Congress is vested by the Constitution with the authority and responsibility to train and provide weapons and equipment for members of the National Guard. The President also has the authority to prescribe regulations concerning these matters. Any judicial determination as to the proper training, equipment or orders of the National Guard would necessarily indicate a lack of confidence in the legislative and executive branches to carry out their responsibilities.

Any relief which the district court could grant would also create the potentiality of multifarious, and even conflicting, pronouncements by the various departments on this subject. Congress, pursuant to its constitutional authority, has enacted statutes governing the training and weaponry of the National Guard. See, e.g., 32 U.S.C. 501, *et seq.*, and 32 U.S.C. 701. Congress may enact new statutes or amend existing statutes in the future. In 1970, a bill which would have required the Governor to seek specific approval of the President before guardsmen could carry live ammunition was introduced in the Senate. 116 Con.Rec. S 13707 (81970). The President has prescribed regulations concerning the training of the National Guard. See dissenting opinion, Judge Celebrezze below, 456 F2d at 619. He also may prescribe new regulations on the subject in the future. If the Court attempts to prescribe the training, weapons or orders of the National Guard, there is a real possibility that such an order would conflict with either existing or future directives from Congress or the President.

The real danger caused by a conflict between a judicial order and the directives of Congress or the President is not the "embarrassment" mentioned in the *Baker case*, 369 U.S. at 217, *supra*. It is the confusion and resulting delay which such conflicting directives would cause. It might even be necessary to seek a judicial resolution of the con-

flict before the National Guard could act. In dealing with civil disorders, the state must be able to act immediately. If there is delay, the harm to be prevented could be accomplished without resistance.

The majority below attempted to frame the issue in familiar judicial terms: Whether nonlethal force would be inevitable where such force is not reasonably necessary. However, an analysis of this issue shows it is not appropriate for judicial determination. Courts are particularly ill-suited to determine the best system of the training, weaponry and orders of a military organization such as the National Guard. Judicial decisions are necessarily inflexible. A court is not able to provide the continuing supervision and revision necessary for intelligent military planning. Cf. *McInnis* v. *Shapiro*, 293 F.Supp. 327 (N.D. Ill. E.D. 1968) affd. sub nom. *McInnis* v. *Oglivie*, 394 U.S. 322 (1969).

A court in making its determination is limited to the evidence presented and the arguments made by the parties. In the instant case it may be assumed that the evidence will be concentrated on the issue of infringement of constitutionally protected rights by the National Guard troops. Many other considerations are relevant in determining the proper training and equipment of such troops. Such training and equipment must be sufficient to protect the safety of the troops themselves; to protect the safety and property of those in the area of the disturbance; to enable the troops to control the disturbance and restore order as soon as possible; etc. Either the legislative or executive branch could deal with this issue in a wider context and provide a more complete solution than a court.

In addition, a court would not have adequate means to discover the information necessary to resolve the issue. There are almost continuous advancements in the equipment and weapons which could be made available to

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National Guard troops. There are also constant developments and changes in military theories on the proper method of training troops. Neither the courts nor the individual parties to the litigation are likely to have ready access to such information. Both the executive and legislative branches of the government have means of gathering the relevant data which are vastly superior to that of the judiciary.

Even if the courts could have access to such information, the legislature or the executive are in a better position to render the best possible solution to the problem. The court has no means to determine how new equipment or new theories of military training will function in an actual emergency. In contrast, the Executive, through the Department of the Army, does have means available for testing new equipment and new methods of training under simulated emergency conditions.

The issue presented herein is a non-justiciable political question under the criteria set forth in *Baker* v. *Carr, supra,* 369 U.S. at 217. The Court of Appeals therefore erred in refusing to affirm the dismissal of the Complaint by the district court.

Any Injunctive Relief Which The District Court Could Grant Would Be An Unwarranted Interference With The Ability Of The State To Protect Itself From Civil Disorders

In areas of possible conflict between the interests of the state and federal government, this Court has consistently attempted to resolve the conflict in a way which will avoid undue interference with the legitimate interests of either the state or federal government. See, e.g., *Union Brokerage Co.* v. *Jensen,* 322 U.S. 202, 207-208 (1944) and *Bute* v. *Illinois,* 333 U.S. 640, 658-659 (1948). This con-

cept referred to as "Our Federalism", was reaffirmed and explained in *Younger* v. *Harris*, 401 U.S. 37 (1971).

> "What the concept [Our Federalism] does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states." (401 U.S. at 444)

In the instant case, any relief which the district court could give would unduly interfere with a legitimate and vital interest of the state: the maintenance of peace and order.

A state has no more important interest than in maintaining its ability to preserve the peace and control disorders. This is necessary not only to protect the safety and well being of its inhabitants, but also to ensure its own continued existence. Those persons who have the responsibility for maintaining peace and controlling disorders must be granted "broad discretion." *Sterling* v. *Constantin*, 287 U.S. 378, 398-399 (1932). The majority below recognized this need in denying injunctive relief against the Governor.

This broad discretion is necessary not only in dealing with the emergency itself but also in preparing to meet such emergency. There is no way to predict disorders. They may occur at any time or place. Neither is there any way to know in advance what measures will be necessary to control them. Those officials who have the responsibility for training and equipping members of the National Guard must therefore be free to prepare for any eventuality.

Any relief which the district court could grant controlling the training, weaponry or orders of the National Guard would by definition restrict the discretion of these officials. Anything which restricts this discretion impairs

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the ability of the state of Ohio to prepare for and control civil disorders. Such relief would therefore unduly interfere with one of the most fundamental and vital interests of the state.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this portion of the judgment of the court below should be reversed.

Respectfully submitted,

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No. 71-1553

In the Supreme Court of the United States

OCTOBER TERM, 1972

JOHN J. GILLIGAN, et al.,
Petitioners

v.

CRAIG MORGAN, et al.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Law Revision Center hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. Oral consent of counsel for the Respondents was obtained. Consent of Petitioners was sought but refused, although counsel for Petitioners indicated that he would not oppose a motion for leave to file. Hence this motion for leave of court is necessary.

The Law Revision Center was created as a permanent division of the University of Colorado School of Law in August, 1968, to enrich the public service contributions of the School of Law

on significant issues of concern by bringing to bear upon such issues the scholarship and resources of the School of Law. Since the Spring of 1970, The Law Revision Center has been engaged in a comprehensive historical and analytical examination of the law governing the use of military troops in civil disorders. This project of The Law Revision Center was designed to supplement the empirical studies conducted by the National Advisory Commission on Civil Disorders and the President's Commission on Campus Unrest. The Center's work in this field has become a standard reference for persons concerned with the problems of controlling civil disorders with military troops, including members of Congress, the National Association of Attorneys General, and scholars of law and other disciplines.

The Center's extensive research through hundreds of cases, statutes, constitutional provisions, other authorities, and historical materials dealing with the problems which are raised by this present case has yielded a perspective which is different from that of any of the parties to this case. In particular, this research has disclosed several instances in the past when action which has been taken by legislatures, executives, or courts with respect to the use of military troops in civil disorders has proven ineffective or even counterproductive, largely because that action was undertaken without any adequate comprehension of the way in which Anglo-American law historically had dealt with these problems. Consequently, actions which appeared desirable and seemed to be well-founded have sometimes served to exacerbate rather than to alleviate the problems, leading support to George Santayana's warning that "Those who cannot remember the past are condemned to repeat it." *Life of Reason* at 284.

The crucial points of law on which the work of the Center can shed needed illumination are complex enough and subtle enough that they are easily misunderstood. They seem not to have been perceived by these parties or by the majority or dissenting judges on the court in the proceedings below. The interest of *amicus* The Law Revision Center in this case is not merely academic, however. The disposition of the present case will have substantial and unavoidable consequences upon the employment of National Guard troops in all states, including the Center's own state, Colorado. In Colorado as well as in

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Ohio and elsewhere, very recent occasions for the use or possible use of National Guard troops in civil disorders have arisen, particularly on university campuses. As a part of the University of Colorado with a clear stake in campus disorder control, the Center will be affected by the manner in which this Court disposes of the issues before it in this case.

It is the position of *amicus* The Law Revision Center that even if the specific relief sought by the prayer of the complaint in this case is relief inappropriate for a court to afford, nevertheless the complaint states facts showing a claim upon which relief can be and urgently needs to be granted. Consequently, *amicus* supports the Respondents in their contention that the Court of Appeals' reversal of the District Court's dismissal of the complaint was proper.

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December 29, 1972

No. 71-1553

in the
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BRIEF OF THE LAW REVISION CENTER

AS AMICUS CURIAE

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Case of Ship Money, The King v. Hampden, 3 State Trials 825 (1637) 5, 21, 30

Chambers v. Hendersonville City of Board of Education, 364 F.2d 189 (4th Cir. 1966) 24

Chastleton v. Sinclair, 264 U.S. 543 (1924) 13

Constantin v. Smith, 57 F.2d 227 (E.D. Tex. 1932) 15

Cottonreader v. Johnson, 252 F. Supp. 492 (M.D. Ala. 1966) 25

Edmund Earl of Kent's Case (1327), in Hale, History of the Common Law 40-41 (2d ed. 1716) 4

Ela v. Smith, 71 Mass. (5 Gray) 121, 66 Am. Dec. 356 (Sup. Jud. Ct. Norfolk Co., 1855) 10

Ex parte McDonald, 49 Mont. 454, 143 Pac. 947 (1914) 15

Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) 14

Griffin v. School Board of Prince Edwards County, 377 U.S. 218 (1964) 24

Grisham v. Hagan, 361 U.S. 278 (1960) 14

Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio, E.D. 1971); aff'd 450 F.2d 480 (6th Cir. 1971) 28

Houser v. Hill, 278 F. Supp. 920 (M.D. Ala. 1968) 24

Hyde v. Melvin, 11 Johns. 424 (N.Y. 1814) 10

Johnson v. Duncan, 3 Martin 530, 6 Am. Dec. 675 (La. 1815) 11

King v. Hampden, The Case of Ship Money, 3 State Trials 825 (1637) 5, 21, 30

Cases (Continued)

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Kinsella v. Singleton, 361 U.S. 234 (1960) 14

Krause v. Ohio, 31 Ohio St. 2d 132, ____ N.E. 2d ____ (1972) 27

Krause v. Rhodes, No. 71-1622 (6th Cir. 1972) 27

Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) 24

Local 309, United Furniture Workers v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948) 25

McConnell v. Hampton, 12 Johns. 203 (N.Y. 1815) 10

McElroy v. Guagliardo, 361 U.S. 281 (1960) 14

Middleton v. Denhardt, 261 Ky. 34, 87 S.W.2d 139 (1935) 15

Miller v. Rhodes, No. 71-1623 (6th Cir. 1972) 27

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Moyer v. Peabody, 148 Fed. 870 (C.C.D. Colo. 1906) 13

NAACP v. Thompson, 357 F.2d 831 (5th Cir. 1966), cert. denied 385 U.S. 820 (1967) 24

O'Callahan v. Parker, 395 U.S. 258 (1969) 14

Refoule v. Ellis, 74 F. Supp. 336 (N.D. Ga. 1947) 25

Reid v. Covert, 354 U.S. 1 (1957) 14

Relford v. Commandant, 401 U.S. 355 (1971) 14

Rex v. Kennett, 5 Car. & P. 282, 172 Eng. Rep. 976 (1781) 7, 8

Rex v. Pinney, 5 Car. & P. 254, 263 n. (b), 172 Eng. Rep. 962, 967 n. (b) (1832) 9

Reynolds v. State Election Board, 233 F. Supp. 323 (W.D. Okla. 1964) 24

Russell Petroleum Co. v. Walker, 162 Okla. 216, 19 P.2d 582 (1933) 15

Scheuer v. Rhodes, No. 71-1624 (6th Cir. 1972) 27

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Cases (Continued)

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Seaney v. State, 188 Miss. 367, 194 So. 913 (1940)..... 15

Smith v. Shaw, 12 Johns. 222 (N.Y. 1815) 10

State v. Coit, 8 Ohio Dec. 62 (Pickaway, G.P. 1897)..... 11, 20, 21

State ex rel. O'Connor v. District Court, 219 Iowa 1165, 260 N.W. 73, 99 A.L.R. 967 (1935)..... 15

Sterling v. Constantin, 287 U.S. 378 (1932)..... 10, 13, 15

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 24

Thomas Earl of Lancaster's Case (1327), 1 Hale, Pleas of the Crown 343-46 (1st Amer. Ed. 1847) 4

Toth v. Quarles, 350 U.S. 11 (1955) 14

United States v. Jefferson County Board of Education, 380 F.2d 385 (5th Cir. en banc), cert. denied, 389 U.S. 840 (1967) 24

United States v. Stewart, 27 F. Cas 1339 (Crim. Ct. D.C. 1857)..... 10

United States ex rel Palmer v. Adams, 26 F.2d 141 (D. Colo. 1928) 15

Williams v. Wallace, 249 F. Supp. 100 (M.D. Ala. 1965) 25

Wilson & Co. v. Freeman, 179 F. Supp. 520 (D. Minn. 1959)..... 15

Wise v. Withers, 7 U.S. (3 Cr.) 330 (1806) 10

Wolin v. Port of N.Y. Auth., 392 F.2d 83 (2d Cir.) cert. denied 393 U.S. 940 (1968)..... 24

Constitutions and Statutes

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Bill of Rights, 1 W. & Mary, sess. 2, c. 2 (1689)	5
Rule 54(c), Fed. Rules Civ. Pro.	26
1 Geo. 1, stat. 2, c. 5 (1714)	5
13 Hen. 4, c.7 (1411)	4
Magna Carta, c. 39 (1215)	4, 17
Ohio Rev. Code § 2923.55	20
Ohio Rev. Code § 5923.23	21
Ohio Rev. Code § 5923.24	21
Ohio Rev. Code § 5923.26	21
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Petition of Right, 3 Car. 1, c. 1, § 8 (1628)	4
5 Rich. 2, Stat. 1, c. 5 (1381)	4
5 U.S.C. § 552(c)	29
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U.S. Const., art. I, § 8,cl. 15; Art. IV, § 4	9

Other Authorities

3 Annals of Cong. 576 (1792)	16
1 Blackstone, Commentaries on the Laws of England 400 (1765)	6
3 Campbell, The Lives of the Chief Justices of England 421-31 (1831)	7
Coke, Third Institute, c. VII, p. 52	5
Coke, Fourth Institute, c. XVII	4
Comptroller General's Report to the Congress, Training and Equipping the Army National Guard for Maintaining Order During Civil Disturbances, Report No. B-160779 (Sept. 1972)	29

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Other Authorities (Continued)

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7 Cong. Rec. 3894 (1878) 16

116 Cong. Rec. 27,339 (1970) 17

Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 Colorado Law Review 1 (1972) 21

Engdahl, Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders, 57 Iowa Law Review 1, 2-5 (1971). . 3, 5, 6, 9, 10, 11, 12, 15

Executive Privilege: The Withholding of Information by the Executive, Hearing before the Subcommittee on Separation of Powers, Senate Judiciary Committee, at 440-41, 92nd Cong., 1st Sess. (1971). 29

Hale, History of the Common Law (2d ed. 1716) 4, 5

1 Hale, Pleas of the Crown 343-46 (1st Amer. Ed. 1947) 4

Hearings on the Nomination of Ralph E. Erickson, Assistant Attorney General, before Senate Judiciary Committee, 92nd Cong., 2d Sess. (1972) 29

Hearings on Presidential Commissions, Senate Judiciary Subcommittee on Administrative Practice and Procedure, 91st Cong., 1st Sess. (1971). 28

The Law Revision Center, A Comprehensive Study of the Use of Military Troops in Civil Disorders, 43 Univ. of Colo. Law Review 399, 408-16 (1972) 11, 20

Maitland, Constitutional History of England 266-28 (1908) 4

Note, The Federal Injunction as a Remedy for Unconstitutional Police Conduct, 78 Yale L.J. 143 (1968) 25

6 Op. Att'y Gen. 466 (1854) 11

Other Authorities (Continued)

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21 Parliamentary History of England 688-98 (W. Cobbett ed. 1814) 7, 8

Report of National Advisory Commission on Civil Disorders (1967) 16, 17

Report of the President's Commission on Campus Unrest (1970) 15, 21, 28

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BRIEF OF THE LAW REVISION CENTER AS AMICUS CURIAE

STATEMENT OF INTEREST OF AMICUS CURIAE

The interest of *amicus* The Law Revision Center in this litigation is set forth in the Motion for Leave to File, bound together with this brief, at page i *supra*.

The arguments of *amicus* in this brief support the position of Respondents, Craig Morgan et al.

SUMMARY OF ARGUMENT

This brief argues that the complaint in this case, fairly construed, states justiciable claims arising from the fact that Ohio by her statutes, orders, rules and practices uses and threatens to use her National Guard troops in civil disorders in a manner that violates historic and fundamental requirements of due process of law. The argument is that the due process violation is present on the face of the statutes and does not depend upon the unpredictable facts of particular disorders.

Part I of the brief summarizes very briefly (with reference to more exhaustive authority) the origin and development and repeated reaffirmation of the historic rule of due process that forbids the employment of military force to control civil disorders. It also explains the nuance of doctrine upon which American constitutional law on this point is based, according to which military units may be sued in civil disorders, but only if they are used as a civilian and not as a military force – that is, subject to civilian law and not subject to military law, controlled in every respect by local civilian officials and not merely by the chief executive as commander-in-chief, and subject to the same standards of civil and criminal liability for their actions that govern civilian personnel in similar situations. It demonstrates that this is the controlling contemporary rule of the American cases, even though this rule may not be consistently respected by legislation and executive practice.

Part II of the brief points out several respects in which, according to the allegations of the complaint, Ohio disregards the rule of due process for the use of military troops in civil disorders. This Part of the brief also points out particular Ohio statutory provisions which are the basis of Ohio's unconstitutional practice, which statutes appear to be wholly or partially void on their face.

Part III of the brief argues that in addition to declaratory relief against the unconstitutional statutes, orders, rules and practices of Ohio in this regard, the complaint states a claim appropriate for injunctive relief. It argues that in addition to injunctive relief responsive to the matters discussed in Parts I

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and II of this brief, it might also be appropriate for the District Court to grant the specific forms of relief with regard to training and equipment that were specifically asked in the prayer of the complaint. The propriety of that specific relief, however, is left to be argued more fully by Respondents in their own brief.

ARGUMENT

I.

THERE IS A JUSTICIABLE DUE PROCESS STANDARD, GIVEN SPECIFIC CONTENT BY SEVEN CENTURIES OF REPEATED REAFFIRMATION, AND RECOGNIZED BY THE DECISIONS OF THIS COURT AS WELL AS OTHER AMERICAN COURTS, AGAINST WHICH THE LAWS, ORDERS, RULES AND PRACTICES OF ANY STATE FOR THE USE OF MILITARY TROOPS IN CIVIL DISORDERS MUST BE TESTED.

In the year 1181 Henry II issued the Assize of Arms, ordering that all free men in England be sworn to arms. Almost from the date of the creation of this *jurata ad arma*—the body of men sworn to arms—English law drew a distinction between how armed force was to be used in civil situations and in war. As a force for defense of the realm in case of war, the *jurata ad arma* were placed under the control of military officials and were governed by rules of law outside the scope of the common law, rules that were administered by a prerogative tribunal called the Court of the Constable and Marshal. However, as a force for the arrest of malefactors and for the suppression of domestic unrest and disorder, the very same *jurata ad arma* were placed under the control of the sheriffs in their respective counties and were governed by the rules of the fledgling common law. In other words, the very same armed men constituted at once the *militia* and the *posse comitatus*, but the militia and the posse were entirely different entities in law, controlled by different officers, and subject to different rules of law (indeed, to different *kinds* of law). The details of this history are more fully set out in Engdahl, *Soldiers, Riots and*

Revolution: The Law and History of Military Troops in Civil Disorders, 57 Iowa Law Review 1, 2-5 (1971).

The essential distinction between governing by sheer force and prerogative, and governing according to law, was recognized when King John promised to deal with his nobles in accordance with "the law of the land." *Magna Carta*, c. 39 (1215). In the fourteenth century that pledge of due process was taken as authority by Parliament for its holding that it was unlawful for the King to seize traitors by military force, and try them and execute them by military process. *Thomas Earl of Lancaster's Case* (1327), in 1 Hale, *Pleas of the Crown*; 343-46 (1st Amer. Ed. 1847); *Edmund Earl of Kent's Case* (1327), in Hale, *History of the Common Law* 40-41 (2d ed. 1716). In 1381 the Peasant's Revolts were suppressed by the *jurata ad arma*. The peasants were suppressed, however, by measures of unrestrained force appropriate to the *jurata ad arma* in their role as a force of war, exceeding what the common law allowed to the same *jurata ad arma* in their role as the posse to suppress riots and disorders. The common law therefore would have punished the members of the *jurata ad arma*, were it not for the fact that King Richard II pardoned them specifically for their acts done *"sanz due proces de loye"* – without due process of law. 5 Rich. 2, Stat. 1, c. 5 (1381).

When the first English riot act was enacted in 1411, it provided for suppression of riots by the *posse comitatus* under the command of civil officers, and made no provision whatsoever for intervention of the *jurata ad arma* in their military as distinguished from this civilian role. 13 Hen. 4, c. 7 (1411). During the Wars of the Roses and under the Tudors, absolutist monarchs did suppress civil disturbances with military force, but legal scholars of that period and of our own agree that those actions were in violation of the law of the land. See Maitland, *Constitutional History of England* 266-68 (1908). What had been suffered under the Tudors was to cause revolution under the Stuarts. When Charles I in 1627 sent military troops instead of relying on the civilian *posse comitatus* to suppress riots in several towns, Parliament postponed all its other business to prepare, under the leadership of the former Chief Justice Lord Coke, the *Petition of Right of 1628*. That

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historic document declared that the practice of dealing with riots and rioters by military means was "wholly and directly contrary to the said laws and statutes of this your realm." 3 Car. 1, c. 1, §8. Later, in his landmark *Institutes of the Laws of England*, Coke elaborated upon this thesis, and added that for a soldier to kill a civilian under a claim of military authority, at a time when civilian courts were open, would be murder. Coke, *Third Institute*, c. VII, p. 52; *Fourth Institute*, c. XVII. It is true that the King's common law judges in *The Case of Ship Money, The King v. Hampden*, 3 State Trials 825, 844-46 (1637), eviscerated the Petition of Right's guarantee against domestic military prerogative; but that erroneous ruling was soon expunged in blood. When Charles on the authority of that decision persisted in employing military measures to deal with domestic problems, it lead directly to revolution and the execution of the King. Controversy over the control and use of the *jurata ad arma*—those men who at once formed the militia and the posse—was the precipitating cause of the great civil wars that began in 1642. See *Soldiers, Riots and Revolution, supra*, 57 Iowa Law Review at 11-14. After the Restoration, the due process principle that military measures must never be employed domestically so long as the civilian institutions of the law remain operable was reiterated by Lord Chief Justice Hale, *History of the Common Law* 39-40 (2d ed. 1716), and reconfirmed by enactment of the 1689 *Bill of Rights*, 1 W. & Mary, sess. 2, c. 2 (1689).

When England was beset with scattered riots and disturbances in protest of the Hanoverian succession in 1714, Parliament enacted a new riot act. While the new act was designed to repair various defects which the developments of three centuries had created in the old 1411 law, it made no change in the due process tradition that riots were to be suppressed only by civilian force. Just like under the 1411 statute, under the 1714 statute riots were to be suppressed by the *posse comitatus* under the control of the ordinary local civilian officers, and there was no authority for military intervention regardless how aggravated the circumstances might be. 1 Geo. 1, stat. 2, c. 5 (1714).

William Blackstone, writing on the eve of American independence, repeated the established due process principle, in

1 Blackstone, *Commentaries On the Laws of England* 400 (1765). Blackstone's restatement served to punctuate the colonists' assertion of their heritage of due process. The colonial charters had been drafted to reflect the recognition of the due process rule against military force in civil disorders. These charter provisions are analyzed in detail in *Soldiers, Riots and Revolution, supra,* 57 Iowa Law Review at 18-22. The explicit provisions of the colonial charters, together with an acute awareness of the due process tradition, explain why the colonists were so incensed when General Gage repeatedly employed military troops to suppress disorders in the colonies. The reason why the tragedy at Boston on March 5, 1770, became known as the Boston Massacre and served as the catalyst for revolution was not that the unruly mob of Bostonians were innocent of any wrongdoing. The reason, rather, was that the employment of *military* troops against even a riotous assembly found no warrant in the Massachusetts Charter and was a brazen affront to the colonists' right to be treated in accordance with due process of law.

The American patriots had specifically in mind the Boston Massacre and other instances of military force used in derogation of the due process principle, when they charged in their Declaration of Independence and other acts of their Continental Congress that the King had "affected to render the Military independent of and superior to the Civil Power," and had contrived to exempt from trial and punishment British troops accused of "murdering" disorderly colonists under color of military authority. See *Soldiers, Riots and Revolution, supra,* 57 Iowa Law Review at 26-28. When they undertook to draft their revolutionary state constitutions, these patriots included numerous provisions deliberately designed to preclude such hated domestic applications of military power. These provisions are analyzed in *Soldiers, Riots and Revolution, supra,* 57 Iowa Law Review at 28-31.

If the law had developed no further, it would be necessary to conclude today that units of the military forces can never be employed to control or suppress civil disorders. That, however, is not the case. The nuance of doctrine that is essential to understanding the modern due process requirements for

the use of military troops in civil disorders originated with Lord Chief Justice Mansfield in the year 1780.

The Lord Gordon Riots in London in 1780 lasted several days, and worked a great deal of destruction before they were finally suppressed when the King sent in military troops. When the mayor of London was afterwards tried for his failure to subdue the riot sooner, his defense was that no civilian force sufficient for the task was at hand, and that to have utilized soldiers would have been contrary to law and would have subjected him to criminal liability if the soldiers should harm anyone. *Rex v. Kennett,* 5 Car. & P. 282, 291-92, 172 Eng. Rep. 976, 981-82 (1781) (argument of Mr. Erskine for defendant). This defense, however, proved inadequate, because the judge at the trial was Lord Mansfield; and Mansfield instructed the jury in accordance with the novel doctrine which he had articulated in Parliament only days after the riots—a doctrine which Erskine in his argument declared had left the Lords in Parliament "planet-struck" when they heard the Chief Justice first propound it.

Mansfield had offered his doctrine as a reply to those Lords who protested that the King's use of soldiers to subdue the riots was a violation of the historic due process principle that military force may never be used to suppress civil disorder. Mansfield's speech to Parliament is reported in 21 *Parliamentary History of England* 688-98; (W. Cobbett ed. 1814); major excerpts from it are reprinted in 3 *Campbell, The Lives of the Chief Justices of England* 421-31 (1831). Mansfield acknowledged that riots could be suppressed only by civilian officers and the *posse comitatus,* all under the rules of civilian law, and could never be suppressed by military force. It will be remembered, however, that since the earliest period the same *jurata ad arma* that constituted the militia also constituted the legally and institutionally distinct civilian posse. Seizing this point, Mansfield argued that the same persons who were members of the army were also members of the posse; and he reasoned that, regardless whether they happened to wear army uniforms, they could be called upon to suppress a riot "not as soldiers, but as citizens."

> The persons who assisted in the suppression of these tumults are to be considered mere private individuals, acting as duty required. My Lords, we have not been living under martial law, but under that law which it has long been my sacred function to administer. For any violation of that law, the offenders are amenable to our ordinary courts of justice, and may be tried before a jury of their countrymen. Supposing a soldier, or any other military person, who acted in the course of the late riots, had exceeded the powers with which he was invested, I have not a single doubt that he may be punished, not by a court-martial, but upon an indictment to be found by the grand inquest of the City of London or the County of Middlesex, and disposed of before the ermined judges sitting in Justice Hall at the Old Bailey.
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> . . . The King's extraordinary prerogative to proclaim martial law (whatever that may be) is clearly out of the question. His Majesty, and those who have advised him (I repeat it), have acted in strict conformity to the common law. The military have been called in—and very wisely called in—not as *soldiers*, but as *citizens*. No matter whether their coats be red or brown, they were employed, not to subvert, but to preserve, the laws and constitution which we all prize so highly.

21 *The Parliamentary History of England* 688-98 (W. Corbett ed. 1814) (emphasis in original).

This Mansfield doctrine promptly became the law in England. It was the rule applied by Lord Mansfield himself in the trial of Mayor Kennett of London in *Rex v. Kennett*, *supra*, and it was applied again by Lord Chief Justice Tindal in charging the Bristol grand jury after the Bristol riots of 1831. Tindal told the grand jury that the role of the military in a riot situation was different from that in a war; that on riot duty the local civil officer (e.g., the mayor or sheriff or magistrate) was in command, and the governing rules of law and the standards of culpability for acts must be the same for the soldiers as they

would be for civilians engaged in suppressing a riot. *Rex v. Pinney*, 5 Car. & P. 254, 263 n. (b), 172 Eng. Rep. 962, 697 n. (b) (1832).

More significant than any later developments in England, however, is the fact that the Mansfield doctrine was adopted as the foundation of federal constitutional and statutory provisions in the United States. The Constitution contains provisions which, if read in ignorance of the Mansfield doctrine, seem to contemplate the use of military troops as a military force in civil disorders. U.S. Const., art. I, §8, cl. 15; Art. IV, §4. If that were the true meaning of these constitutional provisions, it would be strange indeed that the revolutionary passions had so far subsided by 1787 that the ancient rule of due process re-purchased by bloodshed only a decade before could be so casually surrendered. But the error of that construction becomes compellingly clear when one examines carefully the language that was used by the framers, the origins of that language in the Convention, the discussions that took place during the period of its ratification, the deliberations which led to the Bill of Rights, and the debates and enactments of the first Congresses when they implemented the constitutional provisions in question. These enlightening sources are analyzed in detail in *Soldiers, Riots & Revolution, supra*, 57 Iowa Law Review at 35-49. What they demonstrate convincingly is that the Constitutional Convention and the first Congresses were acutely aware of the Mansfield doctrine and deliberately and specifically designed the language of Constitution, Bill of Rights, and statutes in a way that to them seemed clearly to utilize that doctrine.

Their experience since 1776 had indeed taught these statesmen the need for an effective domestic peace-keeping force; and since the laymen's posse was a clumsy and ill-organized body, but professional civilian police forces were still unknown, the idea of utilizing organized and disciplined militia for this purpose held obvious appeal. Under the Mansfield doctrine they could make use of this body as a civilian force under civilian law and local civilian command without violence to their newly reclaimed due process right against domestic use of military force. Read candidly and with care, the Constitution

and original federal statutes provide in accordance with the historic rule of due process that military troops may be used domestically *as soldiers* only when civilian law and government have ceased to be capable of functioning—in terms of the common law criterion, when the courts are closed.[1] Otherwise, in civil disorder or riot however unlawful or extreme, military troops, whether individually or in units, and whether uniformed or not, may be utilized only in accordance with the Mansfield doctrine: as civilians, subject to the same laws that govern civilian emergency control personnel, subordinate in every respect to the local civilian officials, and civilly and criminally responsible for their acts exactly as civilian personnel would be. See *Soldiers, Riots and Revolution, supra*, 57 Iowa Law Review at 42-49.

In proof of this original constitutional understanding, militiamen and members of the national armed forces when employed domestically to enforce the law or restore order were held by courts to be essentially civilians, not soldiers, and to be subject to control by local civil officials and governed by the rules of civilian law. They were in fact conceived of as members of the civilian posse. See *United States v. Stewart*, 27 F. Cas. 1339, 1342-43 (Crim. Ct. D.C. 1857); *Ela v. Smith*, 71 Mass. (5 Gray) 121, 142, 66 Am. Dec. 356, 366 (Sup. Jud. Ct. Norfolk Co., 1855). Soldiers were held liable for official acts they committed against civilians in violation of civilian laws, even though they acted under military orders. *Wise v. Withers*, 7 U.S. (3 Cr.) 330, 337 (1806); *Hyde v. Melvin*, 11 Johns. 424 (N.Y. 1914); *McConnell v. Hampton*, 12 Johns. 203, 204-07 (N.Y. 1815); *Smith v. Shaw*, 12 Johns. 222, 231 (N.Y. 1815). The Supreme Court of Louisiana branded as "preposterous" the notion that a military commander could exercise any authority whatsoever

1. The common law criterion has been adopted in American law; see, *e.g.*, *Sterling v. Constantin*, 287 U.S. 378 (1932). Because in modern times judges do not ride off to war with their King, and may exercise judicial powers even outside their courtroom, a criterion less mechanical and more considerate of the policy of the common law rule would be whether civilian officials and institutions (including military personnel employed as a *civilian* force) are incapable of restoring order.

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in derogation of the civilian law and its local officials. *Johnson v. Duncan*, 3 Martin 530, 6 Am. Dec. 675 (La. 1815). The Attorney General of the United States, explaining the practice of 1854, made specific reference to Lord Mansfield's doctrine. 6 *Op. Att'y Gen. 466* (1854).

Even in Ohio this fundamental rule of due process as adapted through the Mansfield doctrine was recognized and applied by the courts. An Ohio court said in 1897 that a National Guard colonel and his regiment called out to help enforce the laws could

> act as an armed police only, subject to the absolute and exclusive control and direction of the magistrates and other civil officers designated in the statutes, as to the specific duty or service which they are to perform; nor can the sheriff or magistrate delegate his authority to the military force which he summons to his aid, or vest in the military authorities any discretionary power, to take any step or do any act to prevent or suppress a mob or riot.

State v. Coit, 8 Ohio Dec. 62, 63 (Pickaway, G.P. 1897).

It may seem to have been ill-advised for the founding fathers to invest such reliance upon the nuance of doctrine invented by Lord Chief Justice Mansfield. Ever since the Reconstruction Radicals succumbed to the apparent expediency of using military force to impose their high-minded designs upon the South *after* peace had been restored, one excuse after another has been found by legislators and executives, both state and federal, to justify recourse to uniquely military force as an instrument of domestic policy. This historical development in legislation and practice since the Civil War is traced in considerable detail in *Soldiers, Riots and Revolution, supra*, 57 Iowa Law Review at 55-64, and in The Law Revision Center, *A Comprehensive Study of the Use of Military Troops in Civil Disorders*, 43 Univ. of Colo. Law Review 399, 408-16 (1972). The subtlety of the Mansfield doctrine and the deceptive simplicity of statutory and constitutional provisions authorizing the use of troops have given this unconstitutional practice a color of legitimacy; and in the nature of events, it has been difficult and uncommon for judicial challenges of the practice to be made. But if the

Mansfield doctrine is a subtle or easily neglected rule, it is still the only alternative to being impaled upon either horn of an unhappy dilemma; for, without the Mansfield doctrine, one must either conclude that military troops may never in any capacity be used in civil disorders, (which was the pre-Mansfield due process rule), or else renig on seven centuries of history, the hardest-fought struggles of our English and colonial ancestry, and our unique constitutional safeguard against oppressive military regimes.

Except in a handful of ill-conceived decisions that ignored the whole course of due process history on this matter, the American courts which have considered issues arising from the domestic use of military troops have held in accordance with the due process rule that demands subordination to civilian law and officials. The cases are too numerous to list here. Those holding *contra* the due process rule are cited in *Soldiers, Riots and Revolution, supra,* at 65 n. 318. Examples of the far more numerous cases holding in *accord* with the due process rule (including more recent cases from jurisdictions which had earlier held *contra*) are cited and discussed in *Soldiers, Riots and Revolution, supra,* at 67 n. 319.

The most flaunted of the decisions in derogation of the due process rule is that in *Moyer v. Peabody*, 212 U.S. 178 (1909). But *Moyer*, while never explicitly overruled, has been so distinguished and reinterpreted by subsequent Supreme Court decisions as to have lost every bit of its force as precedent.

In *Moyer* the Court held that in a state of "insurrection" military forces could lawfully be employed *as soldiers*. If by "insurrection" were meant a situation where the civilian institutions and officials had been rendered incapable of functioning, this would have been consistent with the due process rule. However, in *Moyer* the Court *per* Justice Holmes held that a governor's finding that an insurrection existed was conclusive and could not be questioned in court. That meant that a governor could declare a riot or any lesser disorder or even (as on the facts in *Moyer)* an anticipated future disorder to constitute an insurrection, and escape all judicial review of his subversion of the due process rule. Holmes himself soon drew

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back from this untenable proposition, observing in *Chastleton v. Sinclair*, 264 U.S. 543, at 547 (1924), that a court cannot ignore the obvious incorrectness of a declaration by another branch when the validity of what is done depends upon the truth of what is declared. And in *Sterling v. Constantin*, 287 U.S. 378 (1932), notwithstanding *Moyer* the Court reviewed the facts which a governor had proclaimed to constitute an "insurrection," held they did not, and found the governor's military acts in derogation of civilian laws and officials to be unlawful.

Where an "insurrection" existed, the Court in *Moyer* had held, military troops could lawfully imprison or even shoot citizens "without sufficient reason." 212 U.S. at 84. But in *Sterling v. Constantin* the Court took a different view of the facts of *Moyer*, finding "sufficient reason" in the fact that "In [*Moyer*] it appeared that the action of the Governor had direct relation to the subduing of the insurrection . . .",[2] and cautioned that "the general language of the [*Moyer*] opinion must be taken in connection with the point actually decided." 287 U.S. at 400. The point which *Sterling* regarded *Moyer* as having decided was not that soldiers could act or be authorized to act "without sufficient reason," but only that they could act in ways that on reasonable reflection could be judged to be directly related to their mission; and even this was a standard to be applied in genuine "insurrection," not in mere civil disorders or riots.

So while *Sterling* managed to avoid overruling *Moyer* in terms, it did completely destroy *Moyer* as a precedent for the use of military troops without subordination to civilian law and local officials in civil disorders, in derogation of the due process rule. Further evidence of the determination of the Supreme Court in *Sterling* to reaffirm the due process requirements is the Court's quotation and endorsement of some of

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2. Thus the Supreme Court in *Sterling* took the same view of the facts in *Moyer* that the Circuit Court in *Moyer* had taken, finding contrary to the allegations in the complaint that the arrest and detention of *Moyer* had been reasonable. See *Moyer v. Peabody*, 148 Fed. 870 (C.C.D. Colo. 1906).

the eloquent language of the opinion in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), which vigorously articulated the due process rule. See 287 U.S. at 402-03.

In a series of recent cases, this Court has restricted the "judicial" power of the military over civilians. *Relford v. Commandant*, 401 U.S. 355 (1971); *O'Callahan v. Parker*, 395 U.S. 258 (1969); *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *Toth v. Quarles*, 350 U.S. 11 (1955). The principle of civilian due process which has found expression in these recent cases is exactly the same historic anti-militaristic principle that forbids the "executive" use of military troops in civil disorders in any way other than as a subordinate *civilian* force, governed by and accountable under civilian law, and under the complete control of the same local civilian officials who would be responsible if military troops had not been used.

Independently of their status as reserve components of the armed forces of the United States, National Guard units, which are the organized historic militia of the states, constitute an organized body of manpower that may be utilized in compliance with state law for a wide variety of purposes: from a state military defense force against sudden invasion or genuine insurrection, at one extreme, to a manpower substitute for striking garbage haulers, at the other extreme. National Guard troops may be used to assist in case of natural disaster, to direct traffic after a football game, to search the woods for lost campers or downed fliers, to exterminate grasshoppers or other pests, or to suppress riots or control other civil disorders. This organized body of manpower constitutes a valuable resource of a state for many purposes, and the federal constitution places absolutely no restraint upon the discretion of state executives, pursuant to valid state law, to employ this organized manpower whenever they consider it desirable. Consequently, the Court of Appeals in this case was correct in rejecting Respondents' request for an injunction against the governor's "premature" calling out of the National Guard, although the reasons and citations given by the Court of Appeals were not apropos.

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What due process requires is not that a state refrain from making use of this convenient body of manpower, but only that the state employ it strictly as a *civilian* force—i.e., subject to the same law with respect to rights, duties, and liabilities that governs civilians in the same circumstances, subject to control in every aspect of their activity by the ordinary local civilian officials, and exempt from the rules, sanctions, and tribunals of military law. Under due process, the National Guard may be used domestically as a *military* force only under the extraordinarily rare circumstances of foreign invasion, or genuine insurrection which renders inoperable the institutions and offices of the civilian law. The most aggravated riot falls considerably short of this extreme. Hence the courts, while never restraining a state from employing the organized manpower of the National Guard, have time and time again held that such troops could not be employed as a military force, superseding ordinary civilian law, displacing local civilian officials, or operating independently of the legal rights, duties, and liabilities which govern civilians. E.g., *Sterling v. Constantin*, 287 U.S. 378 (1932); *Wilson & Co. v. Freeman*, 179 F. Supp. 520 (D. Minn. 1959); *Constantin v. Smith*, 57 F.2d 227, 236 (E.D. Tex. 1932); *United States ex rel Palmer v. Adams*, 26 F.2d 141, 144-45 (D. Colo. 1928); *State ex rel. O'Connor v. District Court*, 219 Iowa 1165, 260 N.W. 73, 99 A.L.R. 967 (1935); *Middleton v. Denhardt*, 261 Ky. 34, 87 S.W.2d 139 (1935); *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924); *Seaney v. State*, 188 Miss. 367, 194 So. 913 (1940); *Ex parte McDonald*, 49 Mont. 454, 143 Pac. 947 (1914); *Russell Petroleum Co. v. Walker*, 162 Okla. 216, 19 P.2d 582 1933). These and numerous additional cases are discussed in *Soldiers, Riots and Revolution, supra*, 57 Iowa Law Review at 67-70 n. 319.

Military troops operating without subordination to civilian law and local civilian authorities have always been viewed by Americans as unacceptable and abhorrent in civil disorder situations. For this reason, indeed, it has been repeatedly observed that their use in this fashion is counterproductive. This was documented with regard to the National Guard troops employed, under Ohio's laws here being challenged, at Kent State University in May, 1970. *Report of the President's Commission*

on Campus Unrest 250-74, 288 (1970). The same phenomenon was observed more generally by the National Advisory Commission on Civil Disorders, and noted in its *Report* at 502-03 (Bantam Books ed. 1968). But it was not a new observation. Troops were used in the same unacceptable fashion during the Reconstruction era, and General Halleck, in his 1870 report on the domestic use of troops during the era, observed that

> the use of troops in executing judicial process and enforcing the revenue and other civil laws seemed to increase rather than diminish the apparent necessity of resorting to such force in civil matters. The ill-disposed become more and more exasperated at being coerced by a force which they think has been unconstitutionally employed against them . . . .

7 *Cong. Rec.* 3894 (1878) (quoted in remarks of Mr. Hewitt). Indeed, when the first Congress debated the utilization of militiamen in civil disorders, congressmen who failed to perceive the nuance of the Mansfield doctrine responded that using military troops to enforce the laws "in a free state, where the people have been taught to look upon the right of refusing submission to unconstitutional acts, may excite insurrections much easier than quell them." 3 *Annals of Cong.* 576 (1792) (remarks of Mr. Page). See also *id.* at 579 (remarks of Mr. Kittera). Contemplating their use as a military force and recalling such incidents as the Boston Massacre, Congressman Page continued: "It should be remembered that the doctrine now contended for [allowing militia to be used to control disorders] is that very doctrine which dismembered the British Empire. Sir, it would have been happy for Britain if this doctrine had never been taught in that Kingdom." *Id.* at 576.

Some lessons are not easily learned, or are easily forgotten. Military troops were used to quell labor disturbances earlier in this century, giving rise to a number of the cases cited above as reaffirming the rule that they could only be used as civilians. More recently, however, the trend of legislation and practice in Ohio and elsewhere has been toward the seeming expedient of utilizing troops as a supervening military force. In this fashion their use has become alarmingly common during the

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past five years. The use of military troops in civil disorders had been quite uncommon until the urban riots of 1967. See *Report of the National Advisory Commission on Civil Disorders* at 497 (Bantam Books ed. 1968). But between January, 1968, and May, 1970, they were employed in civil disorders in the several states on no less than 324 occasions. Testimony of Maj. Gen. Winston P. Wilson, Chief of the National Guard Bureau, Before the President's Commission on Campus Unrest, reported at 116 *Cong. Rec.* 27,339 (1970). No state has made more frequent use of troops than Ohio. The National Advisory Commission on Civil Disorders found in 1968 that both National Guard and civilian officials were unsure of their relative command responsibilities when military troops were used. *Report, supra,* at 518.

When Americans respond in outrage to the presence of men and machines of war on a college campus or a ghetto street, no less than when they lament the military suppression of a freedom movement in Hungary or a demonstration in Greece, they are expressing a fundamental antipathy to prerogative force that has been a proud and prominent part of our culture since the time of *Magna Carta.* What is abhorrent is not the color of the uniforms, nor the fact that the troops may be armed, nor even necessarily the fact that their equipment may differ from that which civilian police ordinarily employ. What makes the use of military troops in civil disorders–in the manner in which Ohio and other states have in recent years come to employ them–utterly abhorrent to the American conscience is the fact that they supersede ordinary law, operate as an occupying force under military law, give only such deference as they might choose to local civilian officials, and claim a shield of immunity and hence irresponsibility for their actions that no civilian officer could pretend to wear.

II.

RESPONDENTS, ON THEIR COMPLAINT IN THE DISTRICT COURT, ARE ENTITLED TO A DECLARATORY JUDGMENT THAT IN CERTAIN FUNDAMENTAL RESPECTS THE LAWS, ORDERS, RULES AND PRACTICES UNDER WHICH OHIO HAS USED AND STANDS READY TO AGAIN USE ITS MILITARY TROOPS IN CIVIL DISORDERS ARE INVALID, BECAUSE IN CONFLICT WITH THE REQUIREMENTS OF DUE PROCESS OF LAW.

Ohio employs her National Guard troops *as soldiers* in civil disorders, in defiance of the requirements of due process of law. They were used thus unconstitutionally under former Governor Rhodes, the original defendant in this action, at Kent State University in May, 1970, with tragic consequences too notorious to require elaboration here; and Governor Gilligan is allegedly ready to thus unconstitutionally employ them again whenever he feels that circumstances demand.

The most prominent allegations of the complaint assert that Ohio National Guardsmen are inadequately and improperly trained and are inappropriately equipped for civil disorder duty. The dissent in the Court of Appeals concluded, and Petitioner State of Ohio asks this Court to rule, that those allegations pose a non-justiciable issue. But the complaint *also* sufficiently alleges facts raising *other* issues under the due process principle examined in Part I of this brief, and these are questionably justiciable and repeatedly adjudicated issues. The question whether it would be appropriate for a federal court to undertake the kind of detailed oversight of training and weaponry that was specifically sought by the prayer of the complaint, is a question that is dealt with briefly in Part III of this brief. Regardless of that, however, there are issues that are raised and essential relief that can be given under the complaint, without any of the difficulties that caused Judge Celebrezze to dissent below.

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The portions of the complaint which raise the unquestionably justiciable due process issues are the following (excerpts from the complaint as quoted in the Court of Appeals opinion):

> In addition, defendants have failed to instruct and order Ohio National Guard troops to limit their use of deadly force during civilian disorders to those instances in which deadly force could lawfully be used by police officers.
>
> . . .
>
> Because of the past actions of defendant's agents and defendants' continued excessive use of Ohio National Guard troops to displace civilian authority during campus disorders, there remains a very real threat that plaintiffs and other students will be subjected to similar beatings and detentions in the future and thereby be deprived of the same rights [as were lost at Kent State].
>
> . . .
>
> [Those actions] were not legitimatized by the application of concepts of Martial Law, because there was neither an invasion nor breakdown of civilian authority. Moreover, to the extent that any provision of Ohio law either authorize the imposition of Martial Law except during the time of invasion or breakdown of civil authority, or authorize a suspension of First Amendment rights as a consequence of the declaration of Martial Law, lawful or otherwise, they violate the First and Fourteenth Amendments to the United States Constitution. Defendants' past action in ordering Ohio National Guard troops to break up lawful assemblies creates a real threat to plaintiffs and other students that, if they participate in lawful activities they will be assaulted, killed, injured or unlawfully detained by Ohio National Guard troops.

In addition, the complaint challenged the validity of the rule of immunity under which the Ohio National Guard operates in civil disorders. The Court of Appeals was undoubtedly correct in its holding that the particular statute to which the

complaint made specific reference (Ohio Rev. Code § 2923.55)—if it is construed as the Court of Appeals construed it—meets no constitutional impediment; but there is an additional immunity statute in Ohio which cannot pass constitutional muster. Ohio Rev. Code § 5923-37, enacted in 1967, creates a special immunity specifically for National Guardsmen, much more generous than any immunity that could be validly extended to civilians. It purports to immunize guardsmen in civil disorders even for acts that can find no support or justification in reason, leaving them laible only for wilful and wanton misconduct.

Fairly construed, these allegations in the complaint assert that Ohio employs and threatens to employ her National Guard in civil disorders as a supervening military force, displacing ordinary local civilian authority, unrestrained by the rules of civilian law that govern civilian authority, and immunized from liability for any but wilfully or wantonly unlawful acts. If these allegations are true, it means that Ohio uses and threatens to use her National Guard in civil disorders in their capacity *as soldiers*, in direct defiance of the requirements of due process of law.

Ohio herself at an earlier day acknowledged and respected the requirements of due process in this regard. See *State v. Coit, supra.* But this complaint alleges (and Ohio's current statutes and orders bear witness) that Ohio has departed from the due process requirement and now employs military force in violation of the Constitution's command. This complaint surely states a claim upon which, at the very least, declaratory relief can be granted.

At the trial which must be allowed on this complaint, there may emerge several other specific particulars in which Ohio's laws, orders, rules and practices concerning military troops in civil disorders are inconsistent with the due process principle examined in Part I. Some major points, however, seem apparent already. The special National Guard immunity statute for civil disorders, Ohio Rev. Code § 5923.37 is certainly void on its face. See The Law Revision Center, *A Comprehensive Study of the Use of Military Troops in Civil Disorders*, 43

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Colorado Law Review 399, at 414-16 (1972); see also Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colorado Law Review 1 (1972). Furthermore, insofar as Ohio Rev. Code §§ 5923.24 and 5923.26 apply to civil disorders, as distinguished from genuine insurrections, and purport to subject guardsmen to the discipline of military law and courts martial for their actions in such disorders, they must be held to be void as against due process. And perhaps most important, Ohio Rev. Code § 5923.23 must be held void as falling short of the requirements of due process, by purporting to authorize National Guard officers to rely on their own discretion as to "mode and means of execution," allowing civil authorities only to "designate in general terms the particular objects to be accomplished." When the Ohio court in *State v. Colt, supra*, ruled that this degree of independent discretion in the military commander was impermissible, it was not merely applying an old-fashioned rule of practice that could be changed by the legislature by enacting this 1953 statute. Rather, it was applying the time-honored principle of due process which our revolutionary forebears and also Lord Chief Justice Mansfield, Lord Chief Justice Hale, Lord Chief Justice Coke, the Parliaments of 1627 and 1327, and even the Barons at Runnymeade, had fought some of their greatest struggles to nurture and preserve. Ohio sought to change this ancient rule in favor of an easier rule of military discretion; but due process forbids it. As the facts that were found by the President's Commission on Campus Unrest with respect to the Kent State affair in Ohio in 1970 attest, under this statute Ohio military officials give local officials only such deference as they like, and proceed to take over and exercise dominant control as an independent force, even in disregard of the wishes of civilian officials. See *Report of the President's Commission on Campus Unrest* at 245, 250, 256, 258, 259-64 (1970).

Unless this Court is prepared to ignore the lesson of *The Case of Ship Money, The King v. Hampden, supra*, and close its eyes to Ohio's defiance of the anti-militaristic principles of due process, it must hold that the complaint in this case entitles Respondents at least to declaratory relief.

III.

INJUNCTIVE RELIEF AGAINST THE FUTURE USE OF THE OHIO NATIONAL GUARD IN CIVIL DISORDERS UNTIL AFTER THE EFFECT OF OHIO'S UNCONSTITUTIONAL LAWS, ORDERS, RULES AND PRACTICES HAS BEEN EFFECTIVELY COUNTERACTED BY NEW AND VALID LAWS, ORDERS, RULES AND PRACTICES MAY BE APPROPRIATE. IN ADDITION, SOME OF THE SPECIFIC ORDERS SOUGHT IN THE PRAYER OF RESPONDENT'S COMPLAINT MAY BE APPROPRIATE.

The declaratory relief discussed in Part II of this brief could be granted by the District Court without any of the difficulties remarked upon by Judge Celebrezze in his dissent in the Court of Appeals. Judge Celebrezze found Respondents' cause of action to raise non-justiciable political questions "to the extent that it requires judicial intervention in National Guard training and weaponry." *Morgan v. Rhodes*, No. 71-1335, at slip sheet opinion p. 21 (6th Cir., Feb. 15, 1972) (Celebrezze, J., concurring in part and dissenting in part). And he observed further that "Any such injunctive relief apart from the training and weaponry of the Guard, would seemingly avoid the political question problem discussed above." *Id.* at 23, Judge Celebrezze went on to conclude that, as he interpreted the grounds of the complaint, beyond the challenge to training and weaponry there was only a challenge to the propriety of National Guard acts in *certain* circumstances, which acts would not be categorically impermissible in *any and all* civil disorder circumstances. On this too-narrow interpretation of the complaint, Judge Celebrezze concluded that the issue was non-justiciable; but he added that, "[w]ere any of the conduct challenged in the present complaint the type which could never be justified in the quelling of civil disorders, I am certain that injunctive relief should similarly be available to prevent its recurrence." *Id.* at 25.

The problem was that Judge Celebrezze took too narrow a view of the complaint. As explained in Part II of this brief, fairly construed this complaint puts in issue the validity under due process of several statutes, standing orders, rules, and

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continuing practices of the Ohio National Guard for civil disorders, *on their face.* The challenge is not merely to certain acts in certain circumstances, but to statutes, orders, and practices in derogation of civilian law and officials that are unconstitutional on their face in *any* circumstances of civil disorder. The specific circumstances and events of May, 1970, detailed in the complaint, simply constitute concrete illustrations of the vices which inhere in the objectionable laws, orders, rules and practices on their face.

Declaratory relief against the objectionable laws, orders, rules and practices is clearly warranted and confronts no justiciability barriers: that is sufficiently demonstrated in Parts I and II of this brief. In addition, however, appropriate injunctive relief against those same laws, orders, rules and practices, or against any use of the Ohio National Guard in civil disorders so long as those laws, orders, rules and practices and their pernicious effects remain, would be appropriate. The task of fashioning specific terms of an injunction is perhaps best left to the District Court after trial; but it seems clear that such relief may even go so far as to forbid use of the Ohio National Guard in civil disorders until such time as Ohio has revised her statutes, orders, rules, and plans for National Guard use in civil disorders sufficiently to guarantee, to the satisfaction of the court, that Ohio's troops will be employed in such disorders only as a strictly *civilian* force, completely subordinate in every respect to local civilian officials, governed by the same rules of law that govern civilian personnel in civil disorders, and liable both civilly and criminally for any wrongdoing to the same extent as any civilian in the same circumstances.

There can be no doubt of the propriety of such relief. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown v. Board of Education,* 349 U.S. 294, 300 (1955). "The aim of equity is to adapt judicial power to the needs of the situation. Thus relief in matters of public, rather than private, interests may be quite different from that ordinarily granted." *Alabama v. United States,* 304 F.2d 583, 591 (5th Cir. 1962), *aff'd per curiam,* 371 U.S. 37 (1962). The relief which plaintiffs demand

is exactly the sort of relief that has been routinely awarded and consistently approved in legislative reapportionment and school desegregation cases, and the great breadth and flexibility of remedies that federal courts have employed in those fields is well known. See, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *United States v. Jefferson County Board of Education*, 380 F.2d 385 (5th Cir. *en banc*), *cert. denied*, 389 U.S. 840 (1967). State officials have been directed to draft acceptable regulatory provisions while the court retains jurisdiction for purposes of supervision. E.g., *Chambers v. Hendersonville City Board of Education*, 364 F.2d 189 (4th Cir. 1966). Where that has not been sufficient, the federal courts have stepped in to draft and implement rules of their own making, binding upon the state and its officers–even in reapportionment cases where the effect of this federal equity interposition may be to dramatically alter the political organization of a state. E.g., *Reynolds v. State Election Board*, 233 F. Supp. 323 (W.D. Okla 1964). From the very outset of the school desegregation problem, the United States Supreme Court has maintained that federal courts under their equity powers can see to the "revision of local laws and regulations which may be necessary" to accomplish desegregation; federal courts have full power "to take such proceedings and order such orders and decrees . . . as are necessary and proper" to accomplish compliance with the Constitution's command. *Brown v. Board of Education*, 349 U.S. 294, 301 (1955). Indeed, the Supreme Court has authorized even greater intrusions than granting relief to the plaintiffs in this case demands, going so far as to approve a court's order compelling officials to levy state taxes to raise funds to open and operate desegregated public schools. *Griffin v. School Board of Prince Edward County*, 377 U.S. 218, 233-34 (1964).

Finally, it may not be at all inappropriate for the District Court to give even the exact relief specifically demanded in the complaint. Injunctions against unconstitutional police conduct have sometimes been issued. E.g., *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966). See also *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968); *NAACP v. Thompson*, 357 F.2d 831 (5th Cir. 1966), *cert. denied*, 395 U.S. 820 (1967); *Houser v. Hill*, 278 F. Supp. 920

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(M.D. Ala. 1968); *Cottonreader v. Johnson*, 252 F. Supp. 492 (M.D. Ala. 1966); *Williams v. Wallace*, 249 F. Supp. 100 (M.D. Ala. 1965); *Local 309, United Furniture Workers v. Gates*, 75 F. Supp. 620 (N.D. Ind. 1948); *Refoule v. Ellis*, 74 F. Supp. 336 (N.D. Ga. 1947). See Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 Yale L.J. 143 (1968). Insofar as they are utilized in civil disorders, National Guard troops are no different in the eyes of the law, under due process, than civilian police personnel.

There is no "textually demonstrable commitment" to other branches to interfere with such relief. It is true that Article I, Section 8 of the Constitution gives Congress power to provide for organizing, arming, and disciplining the militia; but that has reference particularly to their equipment and training for use as a military force. The Constitution does not care whether or not states use militia manpower to control civil disorders, except that it requires that *if* states choose to do so they do so in compliance with due process of law. If a state wishes to use its militia for this domestic purpose, Article I, Section 8 cannot be read as giving Congress the last word in their training or equipment for such tasks. Furthermore, Congress' actions under that clause, like under every one of Congress' powers, is subject to the requirements of due process of law. The militia clause is *unlike* Article IV, Section 4, for example, which vests in the political branches the power to define the meaning of "republican government"; for Congress has not been granted the power to define the meaning of due process.

Accordingly, it may not be appropriate for the District Court to review the training of Ohio guardsmen to insure that they are effectively instructed of their rights and duties and liabilities as civilians in their role in controlling civil disorders. The same is true with respect to the equipment they are instructed to use on such duty. The court might find, for example, that high-powered, rapid-fire automatic rifles designed to deliver copper-clad bullets with deadly accuracy at a range over three miles are so ill-suited to the needs of any conceivable civil disorder that their use is incompatible with due process.

Whether or not the specific relief demanded with respect to training and equipment is relief that can be judicially granted,

however, the other relief described in this brief as called for by the allegations in the complaint can certainly be granted without any problems of justiciability or any other impediments. Rule 54(c), *Fed. Rules Civ. Pro.* provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

CONCLUSION

Petitioner in this case has suggested to this Court that "The power to prevent and suppress civil disorders is the most fundamental of powers." *Petition for Certiorari* at 9. This is unquestionably true; and in view of the frequent disorders that have occurred in recent years, it is an extremely important truth. But it is also true that the right to have civil disorders prevented or suppressed *by civilian force in compliance with the requirements of due process,* rather than by military force, is the most fundamental of rights, guaranteed by all the great documents of our liberty and redeemed by repeated struggles since the dawn of the common law. In her abuse of this most fundamental of powers, Ohio has ignored and destroyed this most fundamental of rights. That is the intolerable situation, a remedy for which is being sought in this case.

In his opinion in the Court of Appeals, Judge Celebrezze took pains to point out that while he did not think a court could give prospective relief he was satisfied that a court could make "an after-the-fact review of National Guard conduct which has allegedly deprived persons of their constitutional rights." Slip-sheet opinion at 24. "After-the-fact review" of any single event, however, simply cannot effectively establish sufficient respect for the due process principles that are here at stake. More than a score of after-the-fact cases, discussed in Part I of this brief and the sources there cited, have invoked the historic principles here examined and applied them to particular facts; and yet Ohio as well as other states continue to enact and utilize statutes, orders, rules and practices all at odds with the demands of due process.

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Furthermore, the sorry record that has been made in the efforts to vindicate these principles "after-the-fact" of the Kent State tragedy of 1970 demonstrates the inadequacy of that supposed remedy. Only days before he wrote his opinion in this case, Judge Celebrezze sat for arguments in *Krause v. Rhodes, Miller v. Rhodes,* and *Scheuer v. Rhodes* (No. 71-1622, 71-1623, and 71-1624, Sixth Circuit), actions under 42 U.S.C. §1983 (and other claims) for an after-the-fact accounting of the Kent shootings. But as demonstrated by Judge Celebrezze's own compelling dissent from the court's affirmance of the dismissals on the pleadings of those cases, on November 17, 1972, the hope of candid "after-the-fact" review in such emotion-charged cases is illusory. The majority in those cases closed its eyes to the precedents, holding that the suits alleging unconstitutional acts by state officers were barred by the Eleventh Amendment; contrived a novel rule of absolute personal privilege for executive officials; ignored those facts of which it could legitimately have taken judicial notice, and on pretext of such notice assumed facts contradictory to the allegations of the unanswered complaints; and even made outrageous accusations of "dissembling" on the part of plaintiffs' lawyers, for alleging facts which the majority, despite the lack of any trial, insisted were untrue.

Other efforts to secure an "after-the-fact" review of the Kent shootings have been no more successful. In *Krause v. Ohio,* 31 Ohio St. 2d 132, ____ N.E.2d ____ (1752), the Supreme Court of Ohio revived a long-discredited old notion of equal protection, and ignored the law's historic insistence upon the necessity for effective redress in a state's own courts for alleged constitutional wrongs, in order to maintain its sovereign immunity from suit on the Kent facts even though Ohio had foreclosed every possible alternative mode of judicial redress for those wrongs as well. Yet, on appeal, the United States Supreme Court did not even perceive any substantial federal question. *Krause v. Ohio,* No. 72-589 (Appeal dismissed, Dec. 11, 1972).

When the Kent State affair was investigated by an Ohio state grand jury, the specially appointed state prosecutors selectively withheld from the grand jury essential evidence which

had been accumulated by the Federal Bureau of Investigation, reviewed by the Department of Justice, and transmitted for the state grand jury's use, including the testimony of at least one guardsman and other evidence indicating that the claim of self-defense had been fabricated by guardsmen after the shooting. The state grand jury's report (the only official report by any investigatory body that has failed to find the shootings unwarranted and unjustified) was expunged by order of a federal court, *Hammond v. Brown*, 323 F. Supp. 326 (N.D. Ohio, E.D. 1971), *aff'd.* 450 F.2d 480 (6th Cir. 1971); and charges against twenty of the twenty-five persons (non-guardsmen) indicted by the state grand jury were dropped by the state itself for lack of evidence in December, 1971.

On representations from the Department of Justice that prosecutorial actions would be diligently pursued, the President's Commission on Campus Unrest in order not to interfere with such prosecutions chose not to utilize the power to grant immunity and compel testimony, which had been given it by congressional joint resolution, P.L. 91-334, 84 Stat. 429. See *Report of the President's Commission on Campus Unrest* at 234 (1970); Testimony of Commissioner James F. Ahearn, *Hearings on Presidential Commissions*, Senate Judiciary Committee Subcommittee on Administrative Practice and Procedure, 91st Cong., 1st sess., at 201 (1971). Even without exercising that power, however, the Commission found that the shootings by Ohio National Guardsmen were "unnecessary, unwarranted, and inexcusable." *Report, supra*, at 289. When more than a year passed without any federal prosecutorial action, the Chairman and several other members of that Commission publicly criticized the delay. One member declared that "It is inconceivable that the Department of Justice would refuse to convene a federal grand jury in Ohio on the basis of the Commission's conclusions supplemented by evidence developed by the FBI and the obvious miscarriages of justice occurring on the state level." Another member charged the administration with callousness and deliberate deceit in its handling of the Kent State matter. See *Hearings on Presidential Commissions, supra*, at 200-02, 217-18, 222 (1971).

Efforts to persuade the Department of Justice to permit a federal grand jury inquiry under 18 U.S.C. §§ 241 and 242,

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have been fruitless. The investigatory findings have been kept secret. While public release of the apparently incriminating evidence compiled by the Federal Bureau of Investigation may be inappropriate, 5 U.S.C. § 552(c) forbids withholding it from Congress, except on a claim of executive privilege. No assertion of executive privilege with respect to this material has been made in compliance with the rules established by President Nixon for the invocation of executive privilege; and without compliance with these rules no valid claim of privilege can be made. See Testimony of Mr. Rehnquist on *Executive Privilege: The Withholding of Information by the Executive, Hearing before the Subcommittee on Separation of Powers, Senate Judiciary Committee*, at 440-41, 92nd Cong., 1st Sess. (1971). Nevertheless the repeated requests of a United States Senate Subcommittee for access to this material have been denied by the Attorney General in violation of U.S.C. § 552(c). See *Hearings on the Nominating of Ralph E. Erickson, Assistant Attorney General, before Senate Judiciary Committee*, at 3-13, 92nd Cong., 2d Sess. (1972); letters of request from Senator Edward Kennedy on behalf of Senate Subcommittee on Administrative Practice and Procedure, dated June 25, 1971, August 26, 1971, October 28, 1971, February 9, 1972, and August 17, 1972; replies dated October 22, 1971 and January 12, 1972, in the files of Senator Kennedy.

Moreover, the changes that were made in National Guard training for civil disorders in response to the events of 1970 and the recommendations of the President's Commission on Campus Unrest, have been largely negated by more recently implemented policies of the Army Chief of Staff. See the *Comptroller General's Report to the Congress, Training and Equipping the Army National Guard for Maintaining Order During Civil Disturbances.* Report No. B-160779 of the Comptroller General (Sept. 8, 1972). Even prior to this recent negation, the changes which had been made in National Guard policy did not satisfy the requirements of due process documented in this brief.

These fruitless efforts are recounted here for the purpose of underscoring the compelling necessity for giving appropriate judicial relief in the present case. They demonstrate, all too

pathetically, that the conceivable alternatives to this kind of judicial action as a means of effectively restoring the rule of due process in National Guard control of civil disorders cannot realistically be expected to succeed. If relief is not given in this present proceeding, effective relief cannot be expected to be found at all.

Choice more than destiny controls the fate of nations; and history must inform that choice. When Charles I used military prerogative to suppress riots in England, it led to the Petition of Right; and when the common law judges eviscerated that Petition's guarantee by their decision in *The Case of Ship Money, The King v. Hampden, supra,* it was only five years until 1642, and barely a decade until 1648. When General Gage used military force against dissident colonists, they made a symbol of the Boston Massacre, which occurred exactly two centuries before the tragedy at Kent State; and when King George responded with toughening measures to bring the colonists into line, revolution flared within six years.

There are elements of unrest still simmering in our country, as volatile as any that were present in the colonies or in seventeenth century England. We must not allow rhetoric to displace our reason; but rationalization that ignores human passion is unreason. This case deals with the very same issue that has catalyzed revolution before; and as Patrick Henry said in his Speech on the Stamp Act to the Virginia Convention on March 23, 1775: "I know of no way of judging the future but by the past."

Respectfully submitted,

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December 29, 1972

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FILED
JAN 12 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1553

JOHN J. GILLIGAN, Governor of Ohio, DANA L. STEWART, Adjutant General of Ohio, ROBERT H. CANTERBURY, Assistant Adjutant General,

Petitioners,

—against—

CRAIG MORGAN, THOM DICKERSON, WILLIAM SLOCUM,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1553

JOHN J. GILLIGAN, Governor of Ohio, DANA L. STEWART, Adjutant General of Ohio, ROBERT H. CANTERBURY, Assistant Adjutant General,

Petitioners,

—against—

CRAIG MORGAN, THOM DICKERSON, WILLIAM SLOCUM,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS

Counterstatement of the Case

Introductory Statement

While there are no misstatements of fact in Petitioners' brief, and it correctly limits itself to the facts of record, Respondents believe that an analysis of the contents and structure of the complaint is necessary for a full understanding of the legal issues raised by its dismissal. Accordingly, the arguments will be preceded by a short analysis of the allegations.

Summary of the Complaint

This action was brought under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983, with jurisdiction based upon 28 U.S.C. §1343. Plaintiffs sued on behalf of a class of students identified as "all persons who are students of Kent State University." All the named plaintiffs were students at Kent State University and members of the student government.

In substance, the complaint alleges that, between May 1-4, 1970, certain demonstrations and disorders occurred in and around Kent State University and the city of Kent, Ohio, and that the original defendants, and the Ohio National Guard troops under their direction, responded to the demonstrations and disorders in such a way as to deprive "plaintiffs and other students" of rights, privileges and immunities secured by the United States Constitution.

It is easiest to understand the complaint if its structure is seen as encompassing: (1) wrongs or deprivations of rights, privileges or immunities, (2) practices, orders or other circumstances causing the wrongs or deprivations, and (3) a claim for declaratory and injunctive relief seeking to correct the practices, orders and circumstances causing the wrongs or deprivations. The claim for injunctive relief rests on the allegations, contained in Paragraph 11 of the complaint that:[1]

> The actions and operating methods of the Ohio National Guard, together with a continuation of the same rules, procedures and operating methods followed by the Ohio National Guard under Defendants' super-

[1] References to the complaint will be made to pages of the Appendix filed by Petitioners and will be designated as "App. —."

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vision and direction creates a substantial threat of repetition of similar acts and continues to deprive plaintiffs and other students of rights, privileges, and immunities secured by the United States Constitution. App. 6.

The wrongs or deprivations, and correlative practices, orders, operating methods and circumstances are, in substance, alleged as follows:

I. The unnecessary interference with the rights of lawful assembly, speech and association and deprivations of life and liberty without due process of law caused by the presence of military troops on a campus (Paragraph 12(a), App. 6-7).

In substance, the complaint alleges facts in support of the theory that the presence of troops, in place of civilian police, in itself interferes with the First Amendment rights set forth above and creates an unnecessary risk of injury and death. The circumstances alleged to cause the wrongs is the "premature" use of troops to perform police functions in and around the Kent campus.[2]

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[2] This portion of the complaint was characterized by Judge Edwards in his opinion below as "an attack on the premature calling out of the Ohio National Guard by Governor Rhodes on May 1, 1970 . . ." Pet. 12 (The Court of Appeals' Opinion is attached to the Petition for a Writ of Certiorari in this case, but consecutively numbered, and, hereafter, references to the Opinion will be to pages of the petition as "Pet. —".) The complaint also alleged "a pattern throughout the State of Ohio of continued and premature use of Ohio National Guard troops to displace civilian authority far in excess of the National norm." App. 7. The Court of Appeals refused to authorize what it characterized as a "prior restraint upon the exercise of emergency power specifically committed by constitution to the executive branch of government," Pet. 13, and therefore affirmed the dismissal. Review of that portion of the Court of Appeals' decision was not sought primarily because it was not believed to foreclose judicial examination of the legitimacy of a

II. Deprivations of life and liberty without due process of law by unjustified killings and injuries by Ohio National Guard troops. Paragraph 12(b). App. 7-8.

The conditions alleged to be causally related to the deprivations include failure adequately to provide Ohio National Guard troops with specialized civilian disorder training or with adequate equipment to respond to civilian disorders with non-deadly force, causing troops to carry live bullets in their guns and failing to properly instruct troops as to the legal limits on their use of deadly force.[3]

Under this portion of the complaint, while the named plaintiffs were neither killed nor injured, it is alleged that continuation of the conditions "constitutes a real threat to plaintiffs and other students of further deprivations of life and liberty without due process of law." App. 7.

III. Beatings and detentions were conducted by Ohio National Guard troops without resort to civilian courts and processes, partially in response to lawful assemblies. These were alleged to deprive members of the class of students of liberty without due process of law, and, in addition, to interfere with rights of speech and assembly. Paragraph 12(c). App. 8.

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national guard call in situations when the troops are actually on a campus, including the question of whether the necessity for troops had been adequately investigated by the governor, as the district court had done in *Bright* v. *Nunn* (unreported) (E.D. Ky., 1970), affirmed 448 F.2d 245 (6th Cir. 1971).

[3] This portion of the complaint is premised in part on the view that, at least when there is no invasion or rebellion troops have no greater authority over civilians than police. See, e.g., *State* v. *Coit*, 8 Ohio Dec. 62 (C.P. 1897).

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It is alleged that the defendants permitted and caused the conduct resulting in the beatings and detentions.

IV. Ohio National Guard troops broke up lawful and peaceable meetings, demonstrations and assemblies depriving persons of rights secured by the First and Fourteenth Amendments to the Constitution. Paragraph 12(d). App. 8-9.

In contradistinction to the preceding claim, this paragraph raises, in substance, the contention that defendants "ordered" a policy of forbidding public assemblies while Ohio National Guard troops were present on the Kent State University campus and challenges the constitutional validity of that policy.

In a separate paragraph, the complaint alleges the existence of Section 2923.55 of the Ohio Revised Code, which purports to provide an immunity from civilian punishment to troops using deadly force in riots,[4] and seeks to raise the claim that it "prospectively" violates the Fourteenth Amendment.[5] It is alleged that Section 2923.55 combines

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[4] It provides, in pertinent part:

> . . . [m]embers of the organized militia . . . when engaged in suppressing a riot or in dispersing or apprehending rioters and after an order to desist and disperse has been issued pursuant to Section 2923.51 of the Revised Code, are guiltless for killing, maiming or injuring a rioter as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend rioters. This section does not relieve a member of the organized militia or armed forces of the United States from prosecution by court-martial for a military offense.

[5] Judge Edwards dealt separately with this portion of the complaint in his opinion for the Court of Appeals. He affirmed the district court's dismissal on the ground that, limited to the standard of "necessary and proper" use of lethal force, the statute was substantially equivalent to the common law. Pet. 22. His opinion, how-

with the other conditions discussed above to increase the risk of further injury and killing of students. App. 10.

The relief requested in the complaint is keyed to the orders, practices and conditions alleged in the complaint to have caused the deprivations of constitutional rights. In general, it can be summarized as seeking a declaration of the unconstitutionality of such orders, practices and conditions and an injunction enjoining the defendants from utilizing Ohio National Guard troops in the area of Kent State University unless the orders, practices and conditions have ceased to exist.

Proceedings Below

The defendants moved in the district court to dismiss the complaint on several grounds. One was that federal laws and regulations control training and supply of troops. It was contended that, as a result, a claim against the defendant state officer was not stated or, if it was, that the United States was an indispensable party. Another ground for dismissal was that the claim for relief against premature use of the Ohio National Guard would, if granted, lead to unwarranted interference with the State's execu-

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ever, explicitly permitted proof, if there was any, under the remanded portion of the case, that Section 2923.55 had been utilized to authorize unnecessary lethal force. *Ibid.* Since that position was contemplated as the heart of the retrospective aspect of plaintiffs' case, Respondents did not seek review of that portion of the Court of Appeals' decision.

Since the Court's decision, the Ohio General Assembly has enacted a comprehensive penal code revision bill and has removed Section 2923.55. Compare Am. H.B. 511, 109th Ohio Gen. Ass. (March, 1972) with Am. Sub. H.B. 511 (Senate Version), 109th Ohio Gen. Ass. (December, 1972) (enacted by Ohio Gen. Ass. December 13, 1972).

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tive power. Finally, it was contended that Section 2923.55 of the Ohio Revised Code was not unconstitutional.[6] App. 12-13.

The defendants' motion came before Judge Connell of the United States District Court for the Northern District of Ohio, Eastern Division, who dismissed it in whole without opinion. App. 14.

Appeal was taken to the United States Court of Appeals for the Sixth Circuit, which affirmed in part and reversed in part. Judge Edwards, writing for the Court, separated the complaint into three parts for analysis. As to two of them—the allegation of premature use of militia in civilian disorders and the claim of unconstitutionality of Section 2923.55 of the Ohio Revised Code, he affirmed the dismissal on the ground that there could be no relief. The remainder of the complaint was held to state a claim which, if proved, would entitle the plaintiffs to some relief. Accordingly, its dismissal was reversed. Judge Celebrezze dissented from that portion of the Court of Appeals' decision.

The defendants petitioned this Court for a writ of certiorari to review that portion of the Court of Appeals' decision which reversed and remanded.[7] Plaintiffs below did not seek to have the partial dismissal reviewed.

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[6] Parenthetically, it was added that the Adjutant General was already seeking non-lethal riot control devices, but the motion did not make clear whether this was presented as an independent ground for relief.

[7] By this time, Governor Rhodes had been replaced by Governor Gilligan, and a new Adjutant General had been appointed for the Ohio National Guard. These names were substituted by Petitioners in their petition to this Court, presumably pursuant to Rule 25, Fed. R. Civ. P.

Introduction to Argument and to Summary of Argument

Petitioners have presented two questions in their brief. Their first claim is that the Political Question doctrine immunizes the training, equipment and orders of National Guard troops from judicial review. The second claim is that something called "Our Federalism" bars a federal court from interfering with the "legitimate activities of a state."

To the extent that Petitioners' second contention is understood as different from their political question contention, it appears to be a more general challenge to federal court injunction actions of the kind represented by the case at bar. Accordingly, Respondents will reverse the order of argument and deal, in Part One, with the general validity of the claims set forth in the complaint as a basis for declaratory and injunctive relief in a federal court and deal in Part Two with the question of whether placing the issues in the context of a civilian disorder in which the National Guard has been activated changes any of the results reached in Part One. While Petitioners have characterized this latter portion of their argument under the political question doctrine, it is believed that a second—and more serious—issue is raised by their position. That issue is whether rights, privileges and immunities secured by the United States Constitution against the civilian police power of a state are not to the same extent secured when its militia is activated to control civilian disorders not amounting to rebellion or invasion.

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Summary of Argument

As to Part One. The sole question before the Court is whether, if the facts alleged are proved, *some* relief is possible. A series of deprivations of constitutionally secured rights are alleged in the complaint to have been inflicted upon members of the class represented by Respondents. These deprivations include deprivations of life and liberty without due process of law, as well as the rights of peaceful assembly and association. Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983 provides for redress of deprivations of constitutionally secured rights, privileges and immunities at equity and, under that act, injunctions have traditionally been given against state officials to prevent repetition of official misconduct. None of the traditional doctrines limiting the jurisdiction of federal district courts is applicable in actions such as this, seeking primarily to enjoin official conduct, rather than the enforcement of state laws. Nothing in the Court's opinion in *Younger* v. *Harris,* 401 U.S. 37 (1971) or its companion cases, or their subsequent applications closes the federal courts to actions such as this one.

Moreover, Respondents are proper parties to bring this action, in view of the allegations of risk of future constitutional deprivations directed at the entire class of Kent State University students, of which they are members, and of past deprivations caused to the same class. The case is not one of the assertion of another's rights. This suit is properly brought as a class action under Rule 23(b) of the Federal Rules of Civil Procedure.

As to Part Two. The political question doctrine serves the goal of identifying whether the judiciary or a coordi-

nate branch of the federal government ought to exercise final decision as to a particular question. While Congress may have some role to play in the training and arming of state militia, it is ultimately a judicial function to determine whether particular executive, including military, conduct has effected a deprivation of constitutional rights and to grant relief. There is no more of a textual commitment to another branch here than there is in any circumstance in which another branch of government, state or local, has primary operating responsibility for a particular governmental function and exercises it in a manner inconsistent with provisions of the Constitution. Nor is the argument of executive expertise any different here, in a military context, than it is in the numerous other contexts in which the Court has found the Constitution to require the granting of judicial relief.

Conduct of the military has not heretofore been thought to be immune from judicial review and redress at equity. Moreover, the fact that a governor decides that military, rather than civilian forces are appropriate to control a particular disorder does not change the legal relationship of the government to the governed under our constitutional system. Even in insurrection or invasion, only the writ of habeas corpus may be suspended, not the rights of citizens.

ARGUMENT

PART ONE

A. *Scope of Review*

This Court has found it necessary on several occasions, in the context of actions under the Civil Rights Act, to reiterate the long-standing rule that pleaded facts are to be treated as true when a simple motion to dismiss is made, and the action is not to be dismissed unless there is no possibility that relief can be granted. See e.g. *Jenkins* v. *McKeithen*, 395 U.S. 411, 421-22 (1969); *Conley* v. *Gibson*, 355 U.S. 41 (1957). In this case, the district judge appears to have lost sight of elementary principles of civil procedure which favor the resolution of disputes after the development of a full factual record, so long as some relief can be anticipated in the event the allegations are proved. The Court has recently reviewed cases in similar contexts and has followed a uniform policy of vacating the dismissal and remanding for trial. See, e.g. *Cruz* v. *Beto*, 405 U.S. 319 (1972); *Haines* v. *Kerner*, 404 U.S. 519 (1972).

The only occasion on which this policy has seriously been questioned in this Court was Justice Rehnquist's dissenting opinion in *Cruz* v. *Beto*, 405 U.S. 319, 323 (1972), in which the suggestion was made that the standard of *Conley* v. *Gibson*, 355 U.S. 41 (1957) ought not to be applied to claims of prisoners. The suggestion, however, was based upon the view that the possibility of leaving the prison for a Court hearing gave an inmate an incentive to file frivolous or fraudulent pleadings, 405 U.S. at 327. No reason has ever been put forth for departing from the *Conley* rule in cases like this one.

B. *Constitutional Deprivations*

Of the several deprivations of constitutional rights raised by the complaint, the Court of Appeals saw the most serious as the deprivation of life without due process of law effected by the unjustified killings of persons. The source for the now-settled view that an arbitrary and unjustified killing by state officials constitutes a deprivation of life without due process of law is *Screws* v. *United States,* 325 U.S. 91 (1945), a criminal case tried under the analogue to Section One of the Civil Rights Act of 1871 (presently 18 U.S.C. §242). The defendant was a sheriff who, having apprehended a person under charge of a criminal offense, proceeded to beat him to death. The Court held that the sheriff's misuse of power, coming, as it did, as a consequence of his being clothed with the authority of the state, was "under color of" state law. 325 U.S. at 107-111. See also *Monroe* v. *Pape,* 365 U.S. 167 (1961); *Williams* v. *United States,* 341 U.S. 97, 99 (1951); *United States* v. *Classic,* 313 U.S. 299, 326 (1941). It then went on to conclude that one acting under color of state law may not, consistently with the due process clause of the Fourteenth Amendment, inflict punishment without the orderly process of trial.

In the years that followed *Screws,* particularly after the impetus added by the application of its state action theory to damage actions under 42 U.S.C. Section 1983 in *Monroe* v. *Pape,* 365 U.S. 167 (1961), the Court's decision in *Screws* has been the theoretical base for a growing body of cases in the lower courts recognizing that an arbitrary killing, or infliction of injury, by state officials, is a deprivation of rights secured by the Fourteenth Amendment. See e.g. *Howell* v. *Cataldi,* 464 F.2d 272 (3rd Cir. 1972); *Anderson* v. *Nosser,* 456 F.2d 835 (5th Cir. 1972); *Carter* v. *Carlson,*

447 F.2d 358 (D.C. Cir., 1971), *cert. granted in part sub nom., District of Columbia* v. *Carter,* 40 U.S.L.W. 3314 (No. 71-564, Jan. 10, 1972); *Jenkins* v. *Averett,* 424 F.2d 1228 (4th Cir. 1970); *Stringer* v. *Dilger,* 313 F.2d 536 (10th Cir. 1963); *Brazier* v. *Cherry,* 293 F.2d 401 (5th Cir.), cert. denied 368 U.S. 921 (1961); *Jackson* v. *Duke,* 259 F.2d 3 (5th Cir. 1958). In some of the cases just cited, the basic *Screws* "due process" theory has been supplemented with theories based upon the Fourth Amendment[8] and the Eighth Amendment's Cruel and Unusual Punishment clause.[9] It has become well settled, however, under any of the theories that a constitutional "shield covers the individual's physical integrity [and] injuries arbitrarily inflicted by the police are constitutionally cognizable and remediable." *Jenkins* v. *Averett,* 424 F.2d at 1232 (Sobeloff, J.).

Moreover, unlike 18 U.S.C. Section 242, which punishes "willful" deprivations of constitutional rights, 42 U.S.C. Section 1983 contains no requirement of specific intent to deprive the victim of a constitutional right. *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961).[10] As a consequence of *Monroe,* several of the circuits have held the *Screws* theory applicable to state officials who did not intend to cause death or injury, and, on that basis, attach liability to supervisory persons, such as those involved in this action, for the negligent or reckless failure to prevent their subordinates from inflicting arbitrary or unjustified killing or injury. See, e.g.,

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[8] *See Jenkins* v. *Averett,* 424 F.2d 1228 (4th Cir. 1970).

[9] *See, e.g., Howell* v. *Cataldi,* 464 F.2d 272, 279-281 (3rd Cir. 1972); *Roberts* v. *Williams,* 456 F.2d 819 (5th Cir.), *cert. denied* 404 U.S. 866 (1971), *addendum* 456 F.2d 834 (5th Cir. 1972); *cf. Jackson* v. *Bishop,* 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.).

[10] *See also Allison* v. *Wilson,* 434 F.2d 646, 647 (9th Cir. 1970); *Puckett* v. *Cox,* 456 F.2d 233 (6th Cir. 1972).

Roberts v. *Williams*, 456 F.2d 819 (5th Cir.), cert. denied 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972); *Carter* v. *Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *cert. granted in part sub nom. District of Columbia* v. *Carter*, 40 U.S.L.W. 3314 (No. 71-564, Jan. 10, 1972). Thus the basic claim that the defendants named in this action are amenable to suit under 42 U.S.C. Section 1983 for the failure to eliminate practices, orders and conditions which unnecessarily caused the deaths and injuries by gunshot alleged in the complaint proceeds on well settled principles.[11]

A second claim arising under the theories set forth above is, in substance, the allegation that Ohio National Guard troops, in the course of their activities on May 1-4, 1970, detained persons on and around the Kent State University campus and beat some of them, inflicting summary punishment without arrest or trial. If true, such conduct falls under the principles discussed above. See *Anderson* v. *Nosser*, 456 F.2d 835, 840-841 (5th Cir. 1972) (*en banc*).[12]

A third claim set forth in the complaint is, in substance, that Ohio National Guard troops under the direction and

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[11] *Ibid. See also Roberts* v. *Williams*, 456 F.2d 819 (5th Cir.), *cert. denied* 404 U.S. 866 (1971), *addendum*, 456 F.2d 834 (5th Cir. 1972).

[12] There does not appear to be any basis for argument that either detention without arrest or beatings are not prohibited by the constitution. Certainly, as to the former, neither *Terry* v. *Ohio*, 392 U.S. 1 (1968) nor any other Fourth Amendment case would authorize detention without arrest. *See Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

Thus, the sole basis for a defense as to this aspect of the case is the contention that National Guard troops, called out in emergency or disorder, can do what the police cannot. That issue will be discussed in Part Two. For a case supporting the existence of such expanded power, *see Valdez* v. *Black*, 446 F.2d 1071 (10th Cir. 1971).

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supervision of defendants below, and in some instances pursuant to direct order, prevented persons from conducting peaceful and lawful assemblies and meetings, some of which were held to petition for redress of grievances connected with the presence of Ohio National Guard troops. As before, this aspect of the complaint follows well-tracked legal theory. It has long been settled that the First Amendment protects the right of peaceable assembly and the right to petition for redress of grievances from arbitrary denial and that such protection extends against state action. See, e.g., *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *DeJonge* v. *Oregon*, 299 U.S. 353 (1937); *United States* v. *Cruikshank*, 92 U.S. 542, 552-553 (1875). Moreover, there is no question that the use of physical force by government to prevent the occurrence of peaceable assemblies is a deprivation of the right.[13] See *Hague* v. *C.I.O.*, 307 U.S. 496 (1939). Cf. *Collins* v. *Hardyman*, 341 U.S. 651 (1951).

C. *Appropriateness of Relief by Injunction or Declaratory Judgment*

Textually, of course, Section One of the Civil Rights Act of 1871 forms a perfect basis for injunctive relief in cases such as this one. It provides, in pertinent part, that one responsible for deprivation of rights, privileges and immunities secured by the Constitution,

> . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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[13] Here, as with the detentions and beatings, there can be no serious defense to the claim, if proved, other than the contention that the presence of the National Guard changes things, which is dealt with in Part Two.

Sections 1343(3) and (4) of Title 28 of the United States Code provide a correlative jurisdictional basis in the United States District Courts to "redress the deprivation" (Subsection (3)) and "to secure equitable or other relief" (Subsection (4)).[14]

The prototypical injunction action of the kind represented by this suit is *Hague* v. *C.I.O.*, 307 U.S. 496 (1939), *affirming and modifying* 101 F.2d 774 (3rd Cir. 1939), *affirming and modifying C.I.O.* v. *Hague,* 25 F. Supp. 127 (D.N.J. 1938). The plaintiffs, various organizations and individuals engaged in a membership drive for a labor union, alleged that the police and municipal officials of Jersey City, New Jersey, pursuant to a plan to prevent their organizing activities in that city, had interfered with and refused to permit peaceable assemblies, the passing out of handbills and lawful picketing, and had physically deported agents of plaintiffs from the territory of Jersey City and harassed, violently molested and unlawfully searched the individual plaintiffs and others connected with them. 101 F.2d at 788. Upon finding that the allegations as to most of the claims were true, the district court issued a decree in favor of the plaintiffs. This Court approved the grant of injunctive relief against the conduct of the police, and their supervisors, in substantially the terms in which

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[14] In its original form, Section One of the Civil Rights Act of April 20, 1871 provided, in relevant part:

> . . . any person . . . shall . . . be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal review upon error and, other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, 1866 . . . ; and the other remedial laws of the United States which are in their nature applicable in such cases.

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it was issued,[15] thus recognizing the legitimacy of such action by a district court.

The lower federal courts, as a consequence of *Hague* v. *C.I.O.* and the fact that its principles have not been seriously challenged in this Court, have regularly exercised jurisdiction over actions seeking injunctive or declaratory relief based on claims that police or other agencies of state or local government were engaging or had engaged in deprivations of constitutionally secured rights. *See, e.g., Lewis* v. *Kugler,* 446 F.2d 1343, 1350 (3rd Cir. 1971); *Build of Buffalo, Inc.* v. *Sedita,* 441 F.2d 284, 289 (2nd Cir. 1971); *Schnell* v. *City of Chicago,* 407 F.2d 1084 (7th Cir. 1969); *Gomez* v. *Layton,* 394 F.2d 764, 766 (D.C. Cir. 1968); *Lankford* v. *Gelston,* 364 F.2d 197 (4th Cir. 1966); *Hairston* v. *Hutzler,* 334 F. Supp. 251 (W.D. Pa. 1971); *Wheeler* v. *Goodman,* 298 F. Supp. 935 (W.D.N.C. 1969); *Cottonreader* v. *Johnson,* 252 F. Supp. 492 (N.D. Ala. 1966); *Refoule* v. *Ellis,* 74 F. Supp. 336 (N.D. Ga. 1947).[16]

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[15] Actually, the Court broadened the injunction by modifying one portion of the decree. Separate opinions were filed by Justice Roberts, for himself and Justice Black; Justice Stone, for himself and Justice Reed; and Chief Justice Hughes, but all agreed with the basic legitimacy of injunctive relief under the circumstances. Justices Douglas and Frankfurter did not participate in the decision. Justice McReynolds was the only member of the Court who questioned the basic legitimacy of injunctive relief in the event of deprivation of constitutionally secured rights, writing,

> Wise management of such intimate local affairs, generally at least, is beyond the competency of federal courts, and essays in that direction should be avoided.

Obviously, the other members of the Court rejected this contention.

[16] In addition to the cases cited recognizing the appropriateness of federal district court injunctive relief to redress invasions by police conduct of personal rights secured by the Constitution, there has been continued use of similar remedies as to other aspects of

The cases just cited are a small sample of the great number of cases which recognize the basic principle that, certainly since the adoption of the Fourteenth Amendment and the enactment of the Civil Rights Act of 1871, the federal district courts have a primary role to play in protecting the constitutional rights of Americans against abuses caused by agencies of state and local government. Against this impressive array of authority, Petitioners apparently seek to persuade the Court that there is a "long-standing policy against interference by a federal court with the legitimate activities of a state." Pet. 2 (Second Question Presented). Unless they mean, by the word "legitimate," activities which *do not* effect a deprivation of constitutionally secured rights, privileges and immunities, the contrary is true; the cases cited, and innumerable others, establish a long-standing policy of "interference" by a federal court when state government interferes with federally secured rights.

There is a suggestion, however, both in the Petition for a Writ of Certiorari and Petitioners' brief on the merits, that recent decisions of this court, such as *Younger* v. *Harris*, 401 U.S. 37 (1971) (Petitioners' Brief, p. 12) and *Askew* v. *Hargrave*, 401 U.S. 476 (1971) (Pet. 9), have changed the relationship of the federal district courts to activities of state government. Any such suggestion is unfounded.

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state government affecting the physical sanctity of human beings. *See, e.g., Wright* v. *McMann*, 460 F.2d 126 (2nd Cir. 1972); *Holt* v. *Sarver*, 442 F.2d 304 (8th Cir. 1971) *affirming* 309 F. Supp. 362 (E.D. Ark. 1970); *Sostre* v. *McGinnis*, 442 F.2d 178 (2nd Cir. 1971), *cert. denied sub nom. Oswald* v. *Sostre*, 405 U.S. 978 (1972); *Jones* v. *Wittenberg*, 330 F. Supp. 707 (N.D. Ohio 1971) (physical mistreatment of prisoners).

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This Court has recently reaffirmed its earlier holdings that prior exhaustion of state remedies cannot be set up as a prerequisite to seeking injunctive relief under the Civil Rights Act. *See Wilwording* v. *Swenson*, 404 U.S. 249 (1971). *See also, McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Monroe* v. *Pape*, 365 U.S. 167 (1961). The doctrine of abstention, which permits a district court to refrain from adjudicating a claim of deprivation of a constitutional right while the plaintiff, or others, seek relief in state court, has no applicability here; the doctrine has as its sole goal the avoidance of unnecessary constitutional decision-making in situations in which the claim of unconstitutionality involves a challenge to an ambiguous state statute and there is some reason to believe that by narrowing construction or other application of state law, state courts could abort the necessity for federal court decision. *See, e.g., Askew* v. *Hargrave*, 401 U.S. 476 (1971); *Reetz* v. *Bozanich*, 397 U.S. 82 (1970); *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941). The only portion of the complaint in this action to which the abstention doctrine might have arguable applicability is the claim of unconstitutionality of Section 2923.55 of the Ohio Revised Code, which has not been brought here for review.[17] In either case, the Court has steadfastly refused to authorize utilization of the abstention technique in cases involving personal liberties. *See, e.g., Wisconsin* v. *Constantineau*, 400 U.S. 433 (1970); *Zwickler* v. *Koota*, 389

[17] Abstention has always been thought of as conferring discretion on the district court to refrain from acting. Actually, in this case Judge Edwards appears to have put a narrowing construction on Section 2923.55 himself and, as a consequence, dismissed.

U.S. 241 (1967); *Harman* v. *Forssenius*, 380 U.S. 528 (1965); *Harrison* v. *NAACP*, 360 U.S. 167 (1959).[18]

Finally, the decision of the Court in *Younger* v. *Harris*, 401 U.S. 37 (1971) and its companion cases[19] do not affect the power of the district courts in connection with the issues raised in this case. There is in the complaint in this case neither a claim to enjoin a pending or threatened criminal proceeding nor a claim to prevent the future enforcement of a criminal statute alleged to be unconstitutional by injunction or declaratory judgment. *Cf. Boyle* v. *Landry*, 401 U.S. 77 (1971). The care which the Court took when it decided *Younger* and its companions to foreclose the extension of its doctrine[20] to areas other than those before the Court is evidenced by the concurring opinion of Justice Stewart, for himself and Justice Harlan. Justice Stewart wrote:

> In all of these cases, the Court deals only with the proper policy to be followed by a federal court when

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[18] For an extended discussion of the inapplicability of abstention to police misconduct suits, see the opinion of Judge Van Dusen in *Lewis* v. *Kugler*, 446 F.2d 1343, 1346-1348 (3rd Cir. 1971). *See also Hobbs* v. *Thompson*, 448 F.2d 456 (5th Cir. 1971).

[19] *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971); *Byrne* v. *Karaxelis*, 401 U.S. 216 (1971).

[20] Actually, it would be very difficult to argue that *Younger* made any fundamental changes in the relationship of the federal district courts to the states. The Court took great pains to point out that it was not making new doctrine. See 401 U.S. 45, 46, 52. Heavy reliance was placed upon cases like *Cameron* v. *Johnson*, 390 U.S. 611 (1968), *Douglas* v. *City of Jeanette*, 319 U.S. 157 (1943), and *Watson* v. *Buck*, 313 U.S. 387 (1941), which predated most of the injunction actions cited in this brief and have not been treated as affecting district court power outside the area of pending criminal prosecutions in state court.

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> asked to intervene by injunction or declaratory judgment in a criminal prosecution which is contemporaneously pending in a state court. 401 U.S. 55.

Moreover, the rationale of the *Younger* line of cases is peculiarly inapplicable to the case at bar. The basic line of the Court's reasoning was that the burden of defending a criminal prosecution was not itself irreparable harm. One could expect to be vindicated against unconstitutional conduct by state criminal trial in the ordinary course of events, so that only when there was some additional injury, as when a series of prosecutions were commenced solely to harass, could there be the irreparable injury which was prerequisite to a federal court injunction.

In a case like the present one, however, the irreparable injury will be suffered unless the district court acts. There is no pending state proceeding in which vindication of the interests is possible. And any claim that federal court action must await such a proceeding is identical to the exhaustion of state remedies contention which this Court has so flatly rejected. Thus, Judge VanDusen appears to have been correct in rejecting similar claims for a panel of the Third Circuit in *Lewis* v. *Kugler*, 446 F.2d 1343 (3rd Cir. 1971). He wrote:

> They [the *Younger* decisions] are not applicable to situations where no prosecution is pending in state courts at the time a federal proceeding is begun, and they do not alter the abstention doctrine insofar as it relates to federal Civil Rights Act claims which do not seek relief that entails intervention in state criminal proceedings. 446 F.2d at 1347.

Finally, the other aspect of *Younger* and *Boyle* v. *Landry*, 401 U.S. 77 (1971), rejecting claims of persons who are neither threatened with imminent state prosecution nor were otherwise injured is even more remote from the case at hand. The injury of the plaintiffs in this action and the class they represent, as alleged in their complaint, was both concrete and great, and the maintenance, without judicial relief, of the conditions which caused those great injuries establishes the imminent presence of an identical risk.

D. *Standing*

The final issue which is implicit in Petitioners' challenge to the power of the district court to grant relief is the doctrine of standing to sue. It is conceded that if in fact the plaintiffs and the class they represent lack standing to sue, then the district court lacked power under Article III of the Constitution and the case was properly dismissed. That is not, however, the case.

Initially, it should be noted, this action is properly brought on behalf of the class of "all persons who are students of Kent State University" under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The crucial allegation, in connection with that rule in this case, is that the "defendants, and their agents, have acted, and threaten to act, toward the entire class in such a manner as to make appropriate an injunction and declaratory judgment on behalf of the entire class."[21] Complaint, Para. 4 (App.

[21] The case law on the subject of the preciseness of class definition appears to leave no room for contentions that the class in this action is not defined with sufficient precision. See e.g., *Yaffe* v. *Powers*, 40 U.S.L.W. 2495 (1st Cir. 1972); *Livingston* v. *Carmine*, 437 F.2d 1050 (5th Cir. 1971); *Schnell* v. *City of Chicago*, 407 F.2d 1084 (7th

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4). What the probabilities are of the injuries suffered by class members in the past being visited on the individual plaintiffs is not the issue; the precise question is whether the potentiality of harm to the class is of sufficient moment to create a live controversy. On that issue there can be little dispute.

The gist of the standing issue in any case is whether the party before the Court alleges a personal stake in the outcome of the controversy which is sufficient to assure concrete facts developed from adverse positions and thereby sharpen the issues for decision by the Court. *See Jenkins* v. *McKeithen,* 395 U.S. 411, 423 (1969); *Flast* v. *Cohen,* 392 U.S. 83, 99 (1968); *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). As that aspect of doctrine of justiciability which has as its primary goal the avoidance of advisory opinions on abstract questions of law, the standing concept requires "injury" in the sense of exposure to harm, to assure that the litigation will not be purely a dispute over matters of policy or interpretation of constitutional language.

Viewed in that light, the personal stake of the individual plaintiffs, and the plaintiff class, is more than sufficient to satisfy the most restrictive notions of standing. This is not a case in which injury, if there is any, is in the future and lightly speculative, *cf., Davis* v. *Ichord,* 442 F.2d 1207 (D.C. Cir. 1970), nor is it a case in which the injury arises solely from reactions of the plaintiffs to governmental conduct otherwise not itself threatening to their interests,

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Cir. 1969); *Hughes* v. *Rizzo,* 282 F. Supp. 881 (E.D. Pa. 1968); *Morgan* v. *Hayth,* —— F. Supp. —— (N.D.O., E.D. No. C. 70-691, June 2, 1972) (unreported to date) (class of Kent State University dormitory residents).

as the Court characterized the issue in *Laird* v. *Tatum*, 408 U.S. 1 (1972). Rather, substantial physical injuries have been suffered by members of the plaintiff class in the past, both in the form of physical harm and in the form of governmental interference with conduct by physical force. Under the allegations of the complaint, the conditions causing the harm remain and thus the risk of harm is identical to the risk preceding the prior infliction of harm. *Cf. Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966) (past illegal searches of class members supporting injunction against future illegal searches).

Nor is there any basis for arguing that the fact that the individual plaintiffs are not the ones who have been shot deprives them of standing. This is an injunction action, aimed at the prevention of future harm. Cf. *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970). Any Kent State University student is as much exposed to future shooting as are those who have been shot in the past. Certainly, the dead are not the appropriate parties to seek prospective relief.

In several recent cases, the Court has recognized that, in injunction actions, it is not past harm which confers standing, but rather the exposure to future harm. Thus, in *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969), the plaintiff sought declaratory and injunctive relief against a Louisiana statute which established a Labor Management Commission of Inquiry which he alleged was, in substance, a device aimed at public condemnation of labor union members without criminal trial. 395 U.S. at 419. Part of the claim of unconstitutionality was based upon the claim that procedural rights, such as the right to counsel, were not afforded to persons compelled to appear before the commission. The plaintiff had not yet been called to testify,

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and his standing to complain was challenged before this Court. Justice Marshall, writing the plurality opinion, found sufficient interest on the part of the plaintiff based upon the allegations that, since the acts of the defendants were designed to injure him, his interest in his reputation and future economic well-being guaranteed sufficient adversariness. 395 U.S. at 423-424.[22] Even the dissenting opinion of Justice Harlan[23] tends to support the standing of respondents here. It was based on the view that the plaintiff had failed to allege any way in which the allegedly unconstitutional procedural priorness of the Louisiana act had injured *anyone* in the past, 395 U.S. at 435, or threatened to injure the plaintiff, 395 U.S. at 437. Neither allegation is missing in the present case.

Of similar import is *Sierra Club* v. *Morton,* 405 U.S. 727 (1972), in which this Court last term held that the Sierra Club, which brought what it characterized as a "public action" challenging an administrative determination of the Department of the Interior respecting the Mineral King Project, lacked standing to sue. The majority opinion goes to pains to point out that, had the complaint alleged that the Club, or its members, would be affected in any way in their future activities as a consequence of the Disney Development, there would be standing. The Court has recently validated this position in *Trafficante* v. *Metropolitan Life Insurance Co.,* 41 U.S.L.W. 4071 (Dec. 7, 1972).

Thus, by comparison to recent decisions of the Court, this is an easy case for standing. There are adversariness

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[22] Separate concurrences were filed by Justices Douglas and Black based on the merits of the case. Neither appeared to disagree with the majority's approach to standing.

[23] The dissent was joined by Justices Stewart and White.

and a genuine personal stake is alleged as to the plaintiffs. As to both the plaintiffs and the class represented, this is not one of those cases in which, although there may be a constitutional right involved, it only inures to the benefit of a class of which the party before the Court, because of a different status, is not a member. Cf. *Tileston* v. *Ullman*, 318 U.S. 44 (1943). Nor is it a case in which there is held to be no legally cognizable injury, and hence no standing, because the Court concludes that the conduct complained of does not, in itself, effect a deprivation of constitutionally secured rights. See *Laird* v. *Tatum*, 408 U.S. 1 (1972).[24] On the contrary, the parties before the court raising the issues they raise make out a perfect case of standing.

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[24] The holding of *Laird* that there is no standing flows from the Court's conclusion that there is *no injury*. Because of the peculiar nature of the injury alleged, however, the *no injury* conclusion really flows from the conclusion that there is *no right*, i.e., that the conduct complained of is not unlawful. All of the injuries alleged in *Laird*, including the alleged "chill" of rights of expression and association, ultimately had as their source an injury to the claim of privacy of the plaintiff, and others. But the claim of privacy asserted is essentially psychic or emotional despair at the inability to control others' possession and use of information about one's self, a claim generally regarded as not itself rising to the level of a right that can be subject to legal injury. Comparison of *Laird* to cases in which interference with the claim to privacy has been afforded recognition, see, e.g., *Katz* v. *United States*, 389 U.S. 347 (1967) exposes the fact that it is not the claimed emotional injury which is different but simply the defendant's conduct. Thus, in post-*Laird* privacy claims, the issue of standing turns solely on whether the conduct alleged to have occurred was in fact unlawful, a point not in issue in the present case.

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PART TWO

A. *The Political Question Doctrine*

Analysis of the "Political Question" contention of Petitioners ought to begin by noting certain inconsistencies in the arguments set forth in support of their position. It appears that Petitioners recognize that the political question doctrine is concerned solely with ascertaining which of the coordinate branches of the federal government has the ultimate authority to finally decide a particular question. Thus, they do not appear to question the Court's holding in *Baker* v. *Carr*, 369 U.S. 186 (1962) that " . . . it is the relationship between the judiciary and coordinate branches of the federal government, and not the federal judiciary's relationship to the states, which gives rise to the Political Question." 369 U.S. at 210. The claim is that final power over national guards rests in the hands of the Congress.

Nevertheless, a substantial portion of Petitioners' argument appears to be that the executive branch, and in particular the state executive, has greater expertise in how to run a militia than a court. See, e.g., Petitioners' brief at 10-11, Pet. 6-7. The "executive expertise" argument would seem to have little relevance to whether the Court or Congress has final authority over the question before the Court.

In considering justiciability, it is the question raised for resolution and not the context in which it is raised which determines whether it is justiciable. For example, *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849) was a simple trespass action for money damages. Crucial to the decision of the case was whether the Charter Government of Rhode Island was in violation of the Republican Guarantee Clause of the

United States Constitution. Since resolution of that question was referred to the Congress (via the seating of Senators) and President (in deciding whether to give aid in rebellion) the Court found it non-justiciable. If the question of whether the United States is at war with a foreign government is non-justiciable in an action to enjoin aid to that government, it is likewise non-justiciable if it becomes relevant in an action for money damages between private parties.[25] Similarly, if the issues raised by the complaint in this case are non-justiciable in an injunction action, they are likewise non-justiciable in an action for money damages arising from the same claim.

The precise claims before the Court, however, are not non-justiciable. They are simply whether past conduct of the Ohio National Guard has effected a deprivation of life and liberty without due process of law and a deprivation of the rights of peaceable assembly and association. Those questions are highly judicial in nature. There is no evidence of a textual commitment of that review function to Congress. Article I, Section 8 of the Constitution authorizes the Congress to provide for organizing, arming and disciplining the militia. As such, it provides a basis for the Congress to legislate respecting the militia. It has never been treated, however, as precluding civilian courts from inquiring into the legality of action taken by the militia toward civilians. See, e.g., *Sterling* v. *Constantin*, 287 U.S. 378 (1932); *Mitchell* v. *Clark*, 110 U.S. 633 (1884). Cf. *O'Callahan* v. *Parker*, 395 U.S. 258 (1967); *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946).

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[25] The considerations behind some of these issues are dealt with at length in Justice Harlan's opinion in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964).

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To say that the power of Congress to legislate respecting a particular subject matter deprives this Court of jurisdiction to review in that subject area would seem to require a rewriting of constitutional history at least as far back as *Marbury* v. *Madison,* 1 Cranch 137 (1804). There is nothing in Article I of the Constitution to suggest the limitation on judicial power sought by Petitioners, and there is nothing in Title 32 of the United States Code, covering the National Guard, to suggest that Congress has purported to assume such power.

So far as other aspects of the traditional political question formulation are concerned, there is even less basis for treating the question as non-justiciable. The claims presented to the Court are peculiarly susceptible of judicial resolution. The interference with peaceable assembly claim is not dissimilar to the claims decided by the Court in *Hague* v. *C.I.O.,* 307 U.S. 496 (1939), and aspects of the summary punishment by beating and detention claim are not much unlike the claim decided in *Screws* v. *United States,* 325 U.S. 91 (1945). The main issue framed by Judge Edwards for the court of appeals—whether the training, weapons and orders of the Ohio National Guard make inevitable the unnecessary use of lethal force in civilian disorder—is likewise peculiarly justiciable. The question ultimately breaks down into two subsidiary ones: whether the Ohio National Guard did in fact use *unnecessary* deadly force at Kent State University on May 4, 1970, and whether the use of such force was a consequence of a deviation, perhaps a gross deviation, from the standard of care for safety of civilians appropriately followed in civilian disorders. The first question is simply a matter of recreating the past after taking testimony, for which

courts are traditionally used. The second is primarily a matter of fixing the appropriate standards of care, perhaps with the aid of experts, a task which courts likewise perform on a daily basis.

Finally, Petitioners' argument that a court lacks the expertise to examine Ohio National Guard conduct, and to fix relief, is one which is regularly raised when the state executive branch is brought before the court and regularly rejected as foreclosing justiciability. See, e.g., *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (educators' expertise); *Baker* v. *Carr*, 369 U.S. 186 (1962) (expertise of local political figures); *Haines* v. *Kerner*, 404 U.S. 519 (1972) (expertise of prison officials). This is not to say, of course, that a district court cannot take into account its own capacities and the nature of the subject matter in framing a decree. Respondents have never suggested that there is a fixed form in which relief must be given, nor did Judge Edwards, in appending the F.B.I. guidelines for riot control to his opinion, Pet. 22, suggest that they were the only form in which a decree could be given. See Pet. 20. Indeed, as to some claims, a district judge might conclude that a declaratory judgment gave sufficient relief.

It would be rather far-fetched to believe that a court, finding past deprivations of constitutionally secured rights by troops, either would or could fashion a decree which, as Petitioners suggest (Petitioners' Brief, p. 10), would disable troops to protect themselves, to protect property and the safety of persons or to restore order in disturbances. The suggestion is a particularly weak basis for a doctrine of non-justiciability.

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B. *Civilian Review of National Guard Conduct*

Ultimately, the claim of non-justiciability must rest on a simple proposition about constitutional government in the United States. That proposition is that a gubernatorial decision to use the militia in an emergency fundamentally changes the relationship of the judiciary to the state executive branch and that any action taken by a governor or the troops under his command is not subject to judicial review. It seems to have behind it the authority of Justice Holmes, who in broad dictum in *Moyer* v. *Peabody*, 212 U.S. 78 (1909) set forth the view that a governor could do anything he pleased during a state of insurrection to bring it to an end. That view of the Constitution, however, was expressly repudiated by the Court in *Sterling* v. *Constantin*, 287 U.S. 378 (1932)[26] and is inconsistent both with the text of the Constitution and the traditional understanding of the role of the Courts in reviewing the actions of the military toward civilians.[27]

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[26] Judge Celebrezze, in his dissenting opinion in the Court of Appeals, seems to read *Sterling* as foreclosing judicial review of anything other than whether the governor was in good faith in deciding whether to use troops. Pet. 31-32. Fundamentally, however, his position suffers from a confusion between judicial review and the appropriateness of a particular kind of injunction. Thus, he suggests that "an after the fact review of National Guard conduct which has allegedly deprived persons of their constitutional rights" can be undertaken by a federal court, but not an action seeking future relief. Pet. 32. *Moyer*, however, was a damage action for an allegedly unlawful detention. If the decision to use troops and how to use troops is unreviewable, then the form of the action is not relevant and, if it is reviewable, then any legitimate remedy authorized to the court would seem possible.

[27] For an extended discussion of some of the cases, including the Court of Appeals' opinion in this case, see N. Waranoff, Federal Judicial Control of the National Guard, 52 Boston Univ. L. Rev. 1 (1972).

Examination of the text of the Constitution reveals no mention of the concept of martial law and only one mention of the concept of suspension of constitutional rights. Importantly, that mention is in the negative:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it. U.S. Const. Art. I, Sec. 9, Clause 2.

There is no historical evidence that, at the time of its adoption, the Habeas Corpus clause was thought of as authorizing a general suspension of rights. Nor does the language of the clause suggest any more than that the courts can be closed during rebellion or invasion.[28] Moreover, even if suspension of rights were authorized, the limitation to rebellion or invasion could not be made to cover the allegations of this case.[29]

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[28] An illustrative case in this connection is *Bishop* v. *Vandercock*, 228 Mich. 299, 200 N.W. 278 (1924), a damage action for personal injuries negligently caused by troops called to duty by the Governor of Michigan. The court refused to foreclose review of troop conduct under a statute affording privilege "from prosecution, except by direct order of the governor for any acts alleged to have been committed while on such service." In order to save its constitutionality, the court read the statute as staying prosecution of actions against activated militiamen, in the absence of gubernatorial direction, until after the emergency. See also *O'Shea* v. *Stafford*, 122 La. 444, 47 So. 764 (1908).

[29] The complaint refers to the events in question as "certain disorders . . . [and] demonstrations . . ." Para. 10. App. 5. There is no suggestion before the Court that a rebellion existed at any time during May 1-4, 1970. Indeed, although it is beyond the record in this case, the only suggestion that there was even a riot at the crucial times of Ohio National Guard action at Kent was a Special Grand Jury report issued by a Portage County, Ohio Grand Jury on October 16, 1970, which was ultimately found to be unlawful and ordered destroyed in *Hammond* v. *Brown*, 323 F. Supp. 326 (N.D. Ohio), affirmed, 450 F.2d 480 (6th Cir. 1971).

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The pre-Civil War understanding of the suspension issue culminated in the Court's decision in *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866), holding that a civilian could not be tried by a military tribunal in Indiana. The Court characterized the suggestion that a military commander had the power to suspend civil rights and their remedies for civilians as "irreconcilable" with civil liberty and rejected it outright, writing:

> Not one of [the Constitution's] safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus. 71 U.S. (4 Wall.) at 124-125.

That the Court's deviation from the *Ex parte Milligan* decision in *Moyer* v. *Peabody,* 212 U.S. 78 (1909) was only temporary is evidenced by the way in which Chief Justice Hughes' opinion for a unanimous Court in *Sterling* v. *Constantin,* 287 U.S. 378 (1932) mirrors the *Milligan* reasoning. He rejected the claim of omnipotence of the state executive after a proclamation of insurrection, writing:

> There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding . . . 287 U.S. 398.

Finally, in rejecting the claim that civilians in Hawaii during World War II could be tried in military courts without being afforded such constitutional rights as a jury trial, the Court seems to have conclusively laid to rest the

notion that emergency warrants suspension. *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946). *Duncan* must be read as rejecting the notion that there is absolute power in the executive during an emergency.

Moreover, the conclusion, as expressed in the cases just discussed, that a gubernatorial determination of emergency is reviewable is identical to holding that conduct pursuant to that determination is reviewable. A governor's order to have somebody shot in the course of a civilian disorder would be reviewable to the same extent as an order suspending the production of oil, and it is the validity of the latter, not the abstract question of "insurrection" which was in issue in *Sterling* v. *Constantin*, 287 U.S. 378 (1932). Moreover, as was pointed out in Part One of this brief, an order to shoot somebody is not different, from a constitutional point of view, from a shooting by troops pursuant to orders which inadequately consider the risk of unjustified shooting; direct order to break up peaceable assembly is not different in kind from an order to troops permitting them to achieve the same end.

Finally, an action for injunction, as in *Sterling*, or declaratory judgment is not different in kind from an action for damages with respect to the subject matter of judicial review of National Guard conduct. It has earlier been shown that recognizing the injunction power is not tantamount to judicial takeover of the executive.[30] As in other contexts, the injunction power can serve as a useful alter-

[30] Nor is it tantamount to insistence that military troops in an emergency are limited to the powers of police in normal times. Common law rules would, as Judge Edwards pointed out, permit certain conduct directed at rioters that is, not normally permissible. Rights, such as the right to assemble are subject to regulations, properly drawn, which take emergency into account.

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native to actions at law, when the latter cannot prevent irreparable harm, and may, in appropriate cases, avoid injuries and avoid fruitless *post hoc* inquiries into the good or bad faith of government officials.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed, and this case should be remanded to the district court for a continuation of proceedings on those portions of the complaint which were upheld by the Court of Appeals.

Respectfully submitted,

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1553

JOHN J. GILLIGAN, Governor of Ohio, *et al.*,

Petitioners,

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Interest of *Amicus**

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York to assist Negroes to secure their constitutional rights through the courts. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved

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* Letters of consent from counsel for the petitioners and respondents in this case have been filed with the Clerk of Court.

by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts.

LDF has successfully litigated hundreds of suits attacking discriminatory and illegal practices of state, county and municipal authorities affecting the lives and liberties of blacks and other minorities. Wth few exceptions, LDF challenges have rested upon the irreconcilability of such practices—often required by statute—with the spirit and intent of the Fourteenth Amendment to the Constitution and upon the affirmative remedies afforded by Congress under the Civil Rights Statutes, specifically, 42 U.S.C. § 1983.**

Over the years, this Court has often pointed out that federal court jurisdiction under § 1983 must be given broad scope to carry out the purposes for which it was enacted. Here, petitioners seek to curtail drastically the scope of that important jurisdictional statute. Since the decision of the Court in this litigation may affect the scope of § 1983, LDF deems it important to bring to the Court's attention some implications of the issues here presented.

** E.g., *Smith* v. *Allwright*, 321 U.S. 649 (1944) (voting discrimination); *Shelly* v. *Kraemer*, 334 U.S. 1 (1948) (restrictive covenants); *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (school segregation); *Carter* v. *Jury Commission*, 396 U.S. 320 (1970) (jury exclusion); and *Haines* v. *Kerner*, 405 U.S. 519 (1972) (prisoners' rights).

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Introduction

We respectfully submit that this Court should affirm the order of the Court of Appeals for the Sixth Circuit remanding this issue to the trial court for a hearing on the merits. There a record can be made which will illuminate whether the important jurisdictional statute § 1983 here at issue applies: petitioners may be found—on the facts—to be without liability, at which point the case most likely will terminate, eliminating need for decision of the § 1983 question. We believe that such a disposition is appropriate here in view of the substantial constitutional question presented by this litigation. The extent to which federal court consideration and resolution of this question may conflict with limitations imposed by the "political question" doctrine or may unduly interfere with certain basic state responsibilities are not matters which can properly be determined on the bare record before the Court here.

Argument

At the commencement of this litigation, a federal trial court was asked to consider and resolve constitutional issues arising out of the May, 1970 confrontation between students and Ohio National Guardsmen at Kent State University. The suit had significance not merely because that incident had attracted national and world-wide attention. What happened at Kent State was but another in a series of tragic episodes involving citizens and armed troops. The suit raised issues equally relevant to these other confrontations. After the Kent State incident, as well as in the aftermath of other similar events, investigations identified inadequate training and overreaction on the part of law enforcement officials in the use of lethal weapons—in several cases, National Guardsmen—as bearing significant

responsibility for the civilian death and injury which resulted.[1]

One of the objectives of these investigations has been to exhort legislative and executive officials to seek means of preventing recurrences of such unfortunate incidents. The trial court's refusal to address itself to the issues this suit presented may well have been premised upon the view that such matters should be dealt with by other branches of government. But we submit, where the issues are properly framed, federal courts, too, have authority to adjudicate litigable matters arising out of these confrontations.

Here the issue is justiciable and within the jurisdiction of the courts of the United States. For, law enforcement officials may not inflict summary punishment upon persons charged with illegal acts. An accused is entitled to be tried, convicted and sentenced by a lawful tribunal, having been accorded at each stage all protections encompassed by "due process". *Screws* v. *United States*, 325 U.S. 91 (1941). Excessive force by law enforcement officials under normal circumstances constitutes "summary punishment" violative of the Constitution. *Monroe* v. *Pape*, 365 U.S. 365 U.S. 365 U.S. 167 (1961). Persons aggrieved by actions of law enforcement officials may seek injunctive relief against future infringement. *Hague* v. *C.I.O.*, 307 U.S. 496 (1939).

If, as the complaint herein alleges, (1) innocent students were killed or injured by Ohio National Guardsmen, (2) they were killed as a direct consequence of failure by state

[1] President's National Advisory Commission on Civil Disorders, *Report*, pp. 323-326 (Bantam Ed., 1968) (Disturbances in Detroit, Newark and other cities in 1967); President's Commission on Campus Unrest, *Report*, pp. 149-183 (Arno Press Ed., 1970) (Kent State and Jackson State in 1970); Nelson and Bass, *The Orangeburg Massacre* (1970), pp. 76-98 (South Carolina State in 1968); and *The Washington Post*, December 15, 1972, p. 1 (Southern University, Baton Rouge in 1972).

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civil and military authorities to train and arm the guardsmen properly, and (3) that failure is of a continuing nature which creates a reasonable likelihood that such conduct will be repeated in the future, then constitutional violations have occurred and are occurring which demand federal court rectification. The fact that the violations occurred and are likely to occur again under martial law conditions does not mean that they cease to be acts litigable in federal court. Martial law cannot suspend constitutional prohibitions against the infliction of summary punishment. See *Ex Parte Milligan,* 71 U.S. 2 (1886).

Where, as here, the complaint raises constitutional issues not manifestly insubstantial or frivolous, mere invocation of "political question" or "comity" doctrines should not close federal court doors to consideration of the merits of the controversy. They are not talismanic phrases sufficient to "obscure the need for case-by-case inquiry" or to preclude the court from engaging in a "delicate exercise in constitutional interpretation", *Baker* v. *Carr,* 369 U.S. 186, 211 (1962) before declining to act.[2]

We hope that this Court will not cut off resort under § 1983 to a federal forum by persons aggrieved by state action; we believe that this case surely presents no occasion to do so. That would thwart the intent of Congress "to provide at least indirect federal control over the unconstitutional actions of state officials" which state agencies might not exercise "by reason of prejudice, passion, neglect, intolerance or otherwise". *District of Columbia* v. *Carter,* 41 U.S.L.W. 4127, 4130 (January 9, 1973). Rather,

[2] E.g., in this case, claimed conflict with the federal executive and legislative branches may turn out not to exist. Regulations relating to riot control may be adequate, but perhaps were not followed by the state defendants. Therefore, federal court resolution would not interfere with the powers of coordinate branches but, instead, vindicate the exercise of such authority.

we urge that this Court reaffirm the responsibility of federal trial courts "to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1969).[3]

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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[3] Such a reaffirmation is eminently desirable in view of the recent decision by the Court of Appeals for the Sixth Circuit in *Krause* v. *Rhodes*, No. 71-1623 (6th Cir., Nov. 17, 1972) *petition for cert. filed sub nom., Scheur* v. *Rhodes*, 72-914 (41 U.S.L.W. 3377, January 9, 1973), for it appears to hold that federal court review of the Kent State incident by way of traditional § 1983 *damage* actions is foreclosed as well. That ruling, when read in conjunction with the trial court's decision here, seems to leave truly aggrieved persons out of court under § 1983 no matter what relief is being sought.

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In the Supreme Court of the United States

October Term, 1972

No. 71-1553

JOHN J. GILLIGAN, GOVERNOR OF OHIO, ET AL.,
Petitioners,

v.

CRAIG MORGAN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PRELIMINARY STATEMENT

Petitioners believe that a large portion of Plaintiffs-Respondents' (herein referred to as Plaintiffs) Brief deals with matters which are either not involved in this case or are not in dispute. Petitioners will therefore attempt to define the issues which they feel are in dispute.

The issue of whether Plaintiffs are entitled to damages if they can prove deprivations of constitutional rights, is not before this Court. Plaintiffs did not request damages in their Complaint.

The issue of whether plaintiffs have standing is also not before this Court. The Court of Appeals refused to rule on the issue of whether Plaintiffs are appropriate representatives of the class they purport to represent and reserved it for determination by the District Court (Cert.

22, 456 F.2d at 615).[1] For the purposes of this Appeal, Petitioners do not dispute the standing of Plaintiffs to represent the class.

Petitioners also do not dispute the following contentions: An arbitrary and unjustified killing by state officials constitutes a deprivation of life without due process; summary punishment without due process violates rights secured by the Fourteenth Amendment; the First Amendment protects the right of peaceable assembly and the right to petition for redress of grievances from arbitary denial by state action; and the use of physical force by the government to arbitrarily prevent the occurrence of such assemblies is a deprivation of such a right.

Petitioners contend that the relief requested is not proper under the circumstances of this case. Petitioners are particularly concerned with the relief requested in paragraph (b) of the prayer of the Complaint. Plaintiffs seek to enjoin the defendants and their successors in office (Petitioners herein) from ordering the National Guard to duty on the Kent campus unless they have been competently trained; have been provided with the best available non-lethal equipment; have been specifically ordered not to use deadly force; and have been ordered not to carry live ammunition (App. 11). Petitioners also contend, however, that any relief which would enjoin or require certain training, or orders or the use of certain weapons, would be improper.

Plaintiffs in their brief cite *Hague* v. *C. I. O.*, 307 U. S. 496 (1939), and a number of lower court cases which indicate that injunctive relief against police misconduct is appropriate under certain circumstances. Cases involv-

[1] References to the appendix will be designated (App. —). The opinion of the Court of Appeals is contained in the Petition for Certiorari, references to the opinion will be designated (Cert. —, 456 F.2d —). References to the brief of Plaintiffs-Respondents and to the main brief of Petitioners will be designated (Resp. —) and (Pet. —).

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ing police misconduct are apparently analogous to the allegations of misconduct in the instant case. However, Petitioners contend that an analysis of these cases shows they are readily distinguishable.

The political question doctrine was not, and could not have been, raised in the police cases. The allegations in the police cases raised issues which are peculiarly suited for judicial determination. The issues as framed by the Court of Appeals in this case are not judicially manageable. The effect of the injunctive relief upon legitimate state activities in the police cases was minimal. In the instant case the requested relief would seriously hinder the ability of the state to protect itself from civil disorders.

Petitioners therefore contend that the *Hague case* and the other cases granting injunctive relief are distinguishable from the instant case and that the reasoning of those cases is not controlling or even persuasive.

ARGUMENT

Political Question

The political question doctrine is essentially a function of the separation of powers. It arises out of the relationship between the judiciary and the coordinate branches of the federal government and not the relationship of the federal judiciary to the states. *Baker* v. *Carr*, 369 U.S. 186, 210 (1962). None of the cases relied upon by Plaintiffs involved the relationship between the judiciary and a coordinate branch of the federal government. The political question doctrine was therefore not applicable. There was no possibility of a constitutional commitment of the issue to a coordinate political department; no possibility of a lack of respect due coordinate branches of government; no possibility of multifarious pronouncements by the various departments; and no possibility of any of the other factors which may give rise to a political question. See *Baker* v. *Carr, supra*, 369 U.S. at 217.

In the instant case, however, all of the formulations which may describe a political question are present. Article I, Section 8, Clause 16 of the Constitution commits to Congress the power and responsibility to prescribe the proper training, weaponry and orders of the National Guard. Congress, pursuant to its constitutional authority, has enacted legislation governing these matters. See, e.g., 70A Stat. 609 *et seq.*, 32 U.S.C. 501 *et seq.* It has also given the Executive the authority to prescribe regulations and issue orders governing the National Guard. 70A Stat. 600, 32 U.S.C. 110. Any relief which the District Court could give would necessarily indicate a lack of respect in the legislative and executive departments and a lack of confidence in the ability of these branches to carry out their responsibilities. Judicial relief as to the training, weapons or orders of the National Guard would also create the possibility of a conflict between the order of the court and existing or future pronouncements on the subject by Congress or the President (See Pet. 8-10).

Petitioners contend that the political question doctrine, which was not applicable in the cases involving police misconduct, justified the denial of injunctive relief by the District Court.

Lack of Judicially Manageable Standards

The issues presented for review in the cases relied upon by Plaintiff are readily distinguishable from those in the instant case. In *Hague* v. *C. I. O.*, *supra*, 307 U.S. 496, and the other cases which approved injunctive relief, the plaintiffs made factual allegations, which if true, showed a systematic pattern of police misconduct directed against an identifiable group. The injunctive relief which plaintiffs requested and the court approved was limited to the specific misconduct involved. None of the cases required a judicial determination of the propriety of the

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training, weapons or orders of the police. None enjoined or required certain police training or the use of certain equipment. For example, in the *Hague case* municipal officials of Jersey City, New Jersey, had forcibly excluded and removed from the city any representatives of labor organizations. They had also prevented such representatives from distributing handbills and denied them access to the public parks.

In *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966), Baltimore police searched over 300 homes in black neighborhoods. No warrants were obtained and in almost every instance the search was based upon an unverified anonymous tip.

Plaintiffs in *Schnell* v. *City of Chicago*, 407 F.2d 1084 (7th Cir. 1969) represented a class of news photographers whose right to gather and report news had been massively interfered with during the Democratic National Convention.

These cases raise questions such as whether there has been a denial or abridgment of freedom of speech or freedom of the press; whether there has been an unreasonable search and seizure; etc. Federal courts have traditionally dealt with and resolved such questions. The court need only determine whether there has been police misconduct which results in a deprivation of constitutionally protected rights and whether there is such a pattern of misconduct that there is a threat of future deprivations. If the court finds such a pattern it may enjoin the misconduct. All of these matters are particularly susceptible of judicial resolution.

In the instant case the issue presented for review is not whether there has been a pattern of misconduct on the part of the National Guard but whether there has been a pattern of training, weaponry and orders which would require the use of fatal force where such force is not reason-

ably necessary. The proper training, weapons and orders of a military organization or even of a police department is not an issue which federal courts have resolved in the past. None of the cases relied upon by Plaintiffs required the court to review or resolve such matters.[2]

Petitioners contend that this issue is not an appropriate one for judicial determination and that the District Court properly refused to grant such relief.

Impact Upon Legitimate State Activities

Petitioners recognize that *Younger* v. *Harris*, 401 U.S. 37 (1971) and its companion cases involved state prosecutions. However, the principle of federalism or "Our Federalism" explained in the majority opinion in *Younger* is not limited to criminal prosecutions. It describes the concept which should apply in all areas of possible conflict between the state and national governments. See, e.g., *Bute* v. *Illinois*, 333 U.S. 640, 658-659 (1948); *Union Brokerage Co.* v. *Jenson*, 322 U.S. 202, 207-208 (1944). Under this concept the national government always attempts to protect federal rights in ways which will not unduly interfere with the legitimate activities of the states (401 U.S. at 444).

Petitioners have no dispute with the relief granted in the cases relied upon by Plaintiffs. The results in these cases do not offend or violate the principle of federalism described in *Younger*. In some of these cases this principle

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[2] In the only applicable cases which Petitioners have been able to find, the court has deferred to the discretion of the military in these matters. See, e.g., *Drifka* v. *Brainard*, 294 F.Supp. 425, 428 (W.D. Wash. S.D. 1968); *McAbee* v. *Martinez*, 291 F. Supp. 77, 78 (D. Md. 1968). In *Bright* v. *Nunn*, 448 F.2d 245 (6th Cir. 1971), relied upon by the majority below in support of its position, the court found the claims that the Guard was untrained for campus disorders and were permitted to carry guns with live ammunition, did not reach constitutional proportions.

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was recognized and discussed. The courts expressed their concern about unnecessary encroachment upon the functions of state and local governments. See, e.g., *Lewis* v. *Kugler*, 446 F.2d 1343, 1352 (3rd Cir. 1971); and *Lankford* v. *Gelston, supra*, 364 F.2d at 201. However, upon balancing the constitutional rights of the individuals involved against the possible harm to legitimate activities of the state, the courts decided in favor of the individuals.

These cases, almost without exception, involved such a clear pattern or policy of deprivation of constitutional rights that a repetition could be expected. The injunctive relief was limited to conduct which was clearly illegal and which could not be justified under any circumstances. There was therefore little risk that beneficial police action would be inhibited. Enjoining forcible exclusion and removal of representatives of labor organizations or enjoining the search of a private house based only on an anonymous tip, would not prevent legitimate law enforcement practices.

In the instant case, however, the allegations do not show as clear a pattern or policy of misconduct as the cases involving the police. There is therefore less basis to expect or presume a repetition of such conduct. Petitioners feel that the threat to Plaintiffs of future deprivations is no more substantial than the threat to the intervening plaintiffs in *Younger* v. *Harris, supra*, 401 U.S. at 42. However, even if we presume that the threat is sufficient to invoke the equitable jurisdiction of a federal court, the probability of future deprivations is substantially less in this case than in the police cases.

The possibility of harm to the interests of the state, on the other hand, is much stronger than in the police cases. The conduct complained of took place during disorders which could not be controlled by civil authorities. The validity of such conduct would therefore depend upon

conditions prevailing at the time. Any relief which the District Court could grant could inhibit constitutional, as well as unconstitutional, methods of controlling the disorders.

In addition, the relief requested herein, and particularly the relief requested in paragraph (b) of the prayer of the Complaint (App. 11), is broader than that approved in the police cases. None of those cases enjoined the training or use of weapons by police. Such relief would seriously interfere with a legitimate state activity – the control of civil disorders. It would hinder and restrict the ability of the state to prepare for and control such disorders (See Pet. 12-13).

Petitioners therefore contend that the denial of injunctive relief by the District Court was a proper exercise of its discretion.

CONCLUSION

For the above reasons Petitioners respectfully submit that the action of the District Court herein was a proper exercise of its discretion. Petitioners therefore submit that the judgment of the District Court should be affirmed and the portion of the judgment of the Court of Appeals involved herein should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1553

JOHN J. GILLIGAN, ET AL., PETITIONERS

v.

CRAIG MORGAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11-35) is reported *sub nom. Morgan* v. *Rhodes* at 456 F. 2d 608.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1972. On May 15, 1972, Mr. Justice Stewart extended the time for filing the petition for a writ of certiorari to May 22, 1972. The petition was filed on May 20, 1972, and was granted on October 24, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

32 U.S.C. 110 provides:

> The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.

The pertinent federal and state regulations are set forth in the Appendix, *infra* pp. 29–45.

QUESTIONS PRESENTED

1. Whether respondents' claim—that the training, weapons, and orders of the Ohio National Guard deprives or threatens to deprive them of constitutional rights—is justiciable.

2. Whether respondents have standing to bring this suit.

INTEREST OF THE UNITED STATES

Pursuant to its authority under Article I, Section 8, cls. 15 and 16 of the Constitution and 32 U.S.C. 110, the United States, through the Department of the Army, trains members of National Guard units for civil disturbance control duties. It is therefore the Army's training policies and practices which the court of appeals has ordered the district court to review. Furthermore, while operational decisions, such as the kind and amount of force to be used in controlling civil disturbances, are left to the states, the Army and the State of Ohio now observe the same rules pertaining to the use of force in civil disturbances. The policies and practices of the Army with respect to the use of force therefore would be implicated in the review the district court has been directed to

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undertake. Accordingly, the United States has a substantial interest in this case.

STATEMENT

Respondents, on behalf of themselves and all other students at Kent State University, filed a complaint in the United States District Court for the Northern District of Ohio, seeking declaratory and injunctive relief. The complaint, which seeks generally to enjoin the Ohio National Guard from suppressing any future civil disturbances on the Kent State campus until its training and its operating policies have been changed, was dismissed by the district court for failure to state a claim for which relief could be granted (App. 14). The court of appeals ~~reserved~~ reversed (Pet. App. 22).

Although the complaint (which is set forth at App. 3–13) is discursive, the court of appeals construed it as attempting to state three related causes of action. The court unanimously affirmed the dismissal of two of those causes of action, and respondents have not sought certiorari with respect to those claims. However, a divided court reversed the dismissal of the third cause of action, which the court read as raising the following question (Pet. App. 18):

> Was there and is there a pattern of training, weaponing and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that nonlethal force would suffice to restore order and the use of lethal force is not reasonably necessary? [Italics omitted.]

The court in effect held that this question fairly stated a claim that the actions of the Ohio National Guard threatened to deprive respondents of life without due process of law, that the claim so stated was justiciable, and that if the claim were sustained, appropriate injunctive relief could be fashioned (Pet. App. 18–21).

SUMMARY OF ARGUMENT

For two separate reasons, respondents' contention—that the training, weapons and orders of the Ohio National Guard deprives or threatens to deprive them of constitutional rights—does not create a justiciable controversy: (1) respondents' complaint does not state a justiciable claim and (2) respondents have no standing to maintain this suit.

1. Respondents seek judicial review of the propiety of the training, weapons and orders of the National Guard. That issue lacks the specificity required for adjudication and would involve the judiciary in inquiries which call for specialized knowledge and skills which it does not possess. The determination of the proper way in which to prepare members of the National Guard for the performance of their military duties must be made by the military. Moreover, judicial prescription, through the use of injunctive powers, of the manner in which the Guard should deal with civilian disorders is singularly inappropriate. The military authorities should not be placed within the constraint of a judicial order telling them how to operate in the midst of the stress, confusion, and unexpected crises which characterize civil disturbances.

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2. Respondents have not shown "a personal stake in the outcome of the controversy." *Baker* v. *Carr*, 369 U.S. 186, 204. Respondents claim that the "rules, procedures and operating methods followed by the Ohio National Guard" (Br. 2) subject them to a continuing threat of future deprivations of their constitutional rights. But their claim of future harm is wholly speculative. The May 1970 shootings at Kent State, tragic as they were, do not by themselves justify fears of a recurrence of such incidents. Moreover, since that time there have been substantial revisions in the rules employed by the Guard with respect to the use of force in civil disorders, and these revisions eliminate the source of much of respondents' expressed concern for the future. Furthermore, respondents' suggestion that the practices and policies of the Guard intimidate them in the exercise of their First Amendment rights has no objective basis. Accordingly, respondents fail to show "specific present objective harm or a threat of specific future harm * * * [and therefore] * * * on this record the respondents have not presented a case for resolution by the courts." *Laird* v. *Tatum*, 408 U.S. 1, 14–15.

ARGUMENT

I. INTRODUCTION: THE STATUTORY AND REGULATORY CONTEXT

The pertinent federal and state statutes and regulations are of crucial importance, and we discuss them below in detail, since in our view they deserve more emphasis than has been given them by the court below, and by the parties and *amici* here in their briefs.

In order that the full setting may be before the Court, we will first describe the constitutional basis for the National Guard system and the pertinent statutes, federal and state, which provide the basic structure for the system. We then discuss the federal government's responsibility for training the National Guard, and, in particular, the training that guardsmen receive for civil disturbance control duty. Finally, in connection with the Guard's civil disturbance control responsibilities, we explain the rules observed by the Army and the Ohio National Guard with respect to the use of force.

A. THE NATIONAL GUARD

The Army National Guard and Air Force National Guard are the "Militia" referred to in Article I, Section 8, clauses 15 and 16 of the Constitution:

> The Congress shall have Power * * *
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *.

In first exercising the militia power, Congress prescribed only the organization and discipline of the militia; subsequently, it also supplied arms and equip-

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ment.[1] Since the beginning of this century, when the term "National Guard" came into use, Congress has also provided funds for the compensation of militia members. The basic structure of the National Guard as it is known today was established by the National Defense Act of 1916, 39 Stat. 166, *et seq.*, as amended, now 32 U.S.C. 101, *et seq.*

The 1916 Act embodied a fundamental decision to use the organized State militia, rather than a standing army or national force of volunteer reserves, as a basic source of reserve military strength. H. Rep. No. 297, 64th Cong., 1st Sess., pp. 2–9, 14 (1916). Congress not only provided for the arming, organization and discipline of the National Guard, but authorized the use of federal funds for the compensation of its offi-

[1] For a comprehensive discussion of the origins of the National Guard, see Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940). In the late Eighteenth century the militia was "a home-defense force, composed of most able-bodied men." Wiener, *supra*, 54 Harv. L. Rev. at 182. Most of the nation's military problems during the late Eighteenth and early Nineteenth centuries were dealt with by the militia and not by a standing army. During this time, however, the deficiencies of the militia became notorious—for example, many militiamen refused to fight outside their own state—and an expansion of the regular army gradually took place. The first modern institutional reforms were introduced by the Army Reorganization Act of 1901, 31 Stat. 748, which established a regular army "suited to the requirements of the United States as a world power" (54 Harv. L. Rev. at 193), and the Dick Act of 1903, 32 Stat. 775, which "provided for an Organized Militia, to be known as the National Guard, which should conform to the Regular Army organization, be equipped through federal funds, and be trained by Regular Army instructors" (54 Harv. L. Rev. at 195).

cers if members of the Guard units and their officers met federally-prescribed standards. See, *e.g.*, 53 Cong. Rec. 4356.

The 1916 Act contemplated that the National Guard would be both a state militia under the command and direction of the state except when called into federal service, and a reserve component of the national armed forces which, when ordered into active federal service, would constitute an integral part of the nation's regular military force. The Act made it clear that the states are to retain command and operational control over the National Guard when it is not in active federal service, and that the state retains its traditional power to use its militia "within the jurisdiction concerned, as its chief executive * * * considers necessary * * *." 32 U.S.C. 109(c).

Despite the large measure of autonomy which Congress gave the states, the Act provided that Guard units could qualify for federal financial support only if they maintained "federal recognition" by participating in federally-prescribed drills and training and by passing inspections designed to assure that their members, organizations, training, instruction and property meet prescribed federal standards. 32 U.S.C. 105, 108, 502. The Act empowered the President to "prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard." 32 U.S.C. 110.

The laws of Ohio illustrate the dual function which the National Guard performs. The state recognizes that its militia is an integral part of the nation's

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overall military program; state law provides that "[t]he military laws of this state shall conform to all laws and regulations of the United States affecting the same subject and anything to the contrary shall be void so long as the subject matter has been acted on by the United States." Ohio Revised Code, § 5923.28 (1971 Supp.). On the other hand, the state also provides that the militia is to exercise its traditional role as a residual state police force which can be used in times of emergency or exceptional stress to aid in quelling civil disturbances. State law provides that "[t]he organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection * * *." Ohio Revised Code, § 5923.21. See, also, Ohio Revised Code, §§ 5923.22, 5923.1 (1971 Supp.).

B. THE ROLE OF THE FEDERAL GOVERNMENT IN TRAINING THE ARMY NATIONAL GUARD

Article I, Section 8, cl. 16 of the Constitution gives Congress the power to provide for "organizing, arming, and disciplining, the Militia" and reserves to the states "the Authority of training the militia according to the discipline prescribed by Congress." The congressional prescription of a uniform training regimen, or discipline, ensures that—should the need arise—the militia can be effectively integrated into the regular Army. But while the Constitution contemplates that the federal government will prescribe the training program, the state, as long as the Guard has not been federalized, actually administers the training.

In prescribing the training of the National Guard, the Army naturally is primarily concerned with insuring that the Guard is qualified to serve as part of the Army if called to active federal duty. But the Army has also promulgated detailed instructions for civil disturbance control training.[2] This training program is for National Guardsmen as well as members of the regular Army.

Members of the Army National Guard receive training at three stages of their enlistment—an initial tour of active duty in the Army; throughout their period of service in their National Guard units; and at summer encampments.

Initially, a person without prior military service who enlists in the National Guard must serve on active duty with the regular Army for a minimum of four months. 10 U.S.C. 511(d). During this period, the guardsman receives his Basic Combat Training ("BCT") and Advanced Individual Training ("AIT"), both of which are taken with regular Army recruits. The guardsman's training at this stage of his enlistment is governed by regular Army regulations and administered by regular Army personnel.

Prior to 1971, this initial training was the same for both regular Army and National Guard recruits. In that year, however, the Army began to give National Guard recruits 16 hours of additional special civil disturbance control training. This special training was initiated in recognition of the fact that Guard units

[2] See Army Subject Schedule 19–6, "Control of Civil Disturbances," dated August 9, 1972, a copy of which has been lodged with the Court.

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are more likely to be called to suppress civil disturbances than are regular Army units.[3]

Individuals with prior military service may enter the National Guard without undergoing the active duty required of enlistees without prior service. 10 U.S.C. 510(b)(2). If such persons completed their regular service without having received civil disturbance training, Army regulations require that they receive eight hours of individual civil disturbance training before they participate in the National Guard's own training program.[4]

Most of the training a guardsman receives after his integration into a National Guard unit is conducted by Guard personnel. While each unit of the National Guard must assemble for drill and instruction at least 48 times a year (32 U.S.C. 502(a)(1)) and may not receive credit for a drill unless "the training is of the type prescribed by the Secretary concerned" (32 U.S.C. 502(d)(3)), the basic decisions with respect to allocation of training times are made by the State Adjutants General. Thus, for example, the Army requires that whenever a National Guard unit is assigned a new civil disturbance mission, it must use the earliest available weekend drills to conduct civil disturbance training; similarly, all units with civil disturbance missions are required to conduct annual

[3] See paragraph 3c, Appendix XXV, Aux F to "Reserve Enlistment Program of 1963," a copy of which has been lodged in the Court.

[4] Paragraph 4a, Appendix XV, Aux F to "Training in Civil Disturbance Control Operations," a copy of which has been lodged in the Court.

civil disturbance refresher training. In both cases, the training must follow federal standards. The commander of the unit, however, is given discretion, within certain limits, to vary the hours devoted to any particular subject (*e.g.*, riot control formations).[5]

Finally, guardsmen receive training during the summer encampments which all Guard units must participate in for at least 15 days each year. 32 U.S.C. 502(a)(2). Since the annual summer camp training is devoted primarily to maintaining the Guard's combat readiness for its national defense role, civil disturbance training is not conducted at such times unless specifically authorized by the Continental Army Command.[6]

C. RULES PERTAINING TO THE USE OF FORCE

Closely related to the civil disturbance control training which guardsmen receive are the "use of force" rules to which they are subject when in an operational or mobilized status. When the Guard is involved in civil disturbance control while in federal status, the Army's use-of-force rules govern. More frequently, the Guard is in state status when it is called on to perform civil disturbance control duties. In such circumstances it is subject to the state's use-of-force regulations. While the National Guards of all states, including Ohio, have now voluntarily adopted the federal standards as their own, the Ohio rules at the time

[5] See, *e.g.*, paragraphs 2a(2), 3a and 3b, Appendix XV Anx F to "Training in Civil Disturbance Control Operations," note 4, *supra*.

[6] See paragraph 3c, Appendix XV Anx F to "Training in Civil Disturbance Control Operations," note 4, *supra*.

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of the Kent State incident (*i.e.*, May 1970) were substantially different from the federal rules and quite different from what they are today.

1. Army Use-of-Force Rules

Since March 1968, Army rules have strictly limited the use of force in civil disturbance control operations to the minimum necessary to accomplish the mission.[7] The current rules, which are set forth in Appendix A, *infra*, pp. 29–40, provide detailed limitations on the use of deadly force. Such force is authorized only where (App. A, *infra*, p. 31):

> (1) Lesser means have been exhausted or are unavailable; and
>
> (2) The risk of death or serious bodily harm to innocent persons is not significantly increased by its use; and
>
> (3) The purpose of its use is one or more of the following:
>
> (a) Self-defense to avoid death or serious bodily harm * * *;
>
> (b) Prevention of a crime which involves a substantial risk of death or serious bodily harm (for example, setting fire to an inhabited dwelling or sniping), including the defense of other persons;
>
> (c) Prevention of the destruction of public utilities or similar property vital to public health or safety; or
>
> (d) Detention or prevention of the escape of persons who have committed or attempted

[7] See Field Manual 19–15, "Civil Disturbances and Disasters," dated March 25, 1968, a copy of which has been lodged in the Court.

to commit one of the serious offenses referred to in (a), (b), and (c) above.

The rules further provide with respect to the use of live ammunition (App. A, *infra*, pp. 32–33):

> Task force commanders are authorized to have live ammunition issued to personnel under their command. Individual soldiers will be instructed, however, that they may not load their weapons * * * except when authorized by an officer or, provided they are not under the direct control and supervision of an officer, when the circumstances would justify their use of deadly force * * *. Retention of control by an officer over the loading of weapons until such time as the need for such action is clearly established is of critical importance in preventing the unjustified use of deadly force. Whenever possible, command and control arrangements should be specifically designed to facilitate such careful control of deadly weapons.

The rules also provide several other safeguards relating to the use of force and the control of crowds. See generally App. A, *infra*, pp. 29–40.

2. Ohio Use-of-Force Rules

The use-of-force rules of the Ohio National Guard that were in effect during May 1970 differed substantially from those of the Army. See App. B, *infra*, pp. 41–45. The Ohio rules did state that only the minimum force necessary should be used. However, they further provided (App. B, *infra*, p. 44) that "[i]n any instance where human life is endangered by the force-

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ible, violent actions of a rioter, *or* when rioters to whom the Riot Act has been read cannot be dispersed by any other reasonable means, then shooting is justified" (emphasis added). Furthermore, contrary to the Army rules, the Ohio directive specified that guardsmen were to carry loaded rifles. See App. B, *infra*, p. 43.

In December 1970, following the shootings at Kent State, the Ohio National Guard issued a new operations plan which adopted the Army use-of-force rules verbatim.[8]

II. RESPONDENTS' CLAIM—THAT THE TRAINING, WEAPONS, AND ORDERS OF THE OHIO NATIONAL GUARD DEPRIVE OR THREATEN TO DEPRIVE THEM OF CONSTITUTIONAL RIGHTS—IS NOT JUSTICIABLE

Respondents seek a judicial inquiry into and a judicial determination of the adequacy of the current training practices and policies of the Ohio National Guard. For reasons which are discussed below (see pp. 20–28, *infra*), we believe that respondents do not have standing to litigate those issues. But we further believe that the kind of judicial involvement in and supervision of military affairs which respondents' complaint would require is beyond the proper sphere of judicial action.

[8] See Appendix 2 to Annex C to Oplan Act, a copy of which has been lodged in the Court. By directive dated June 28, 1972, a copy of which has also been lodged in the Court, the Ohio Adjutant General in effect incorporated all the amendments made to the Army rules up to that date and added further protective rules.

The court below construed respondents' complaint as alleging that the training, weapons, and orders of the Ohio National Guard "make inevitable the use of [unnecessary] fatal force in suppressing civilian disorders * * *" (italics omitted; Pet. App. 18). The court assumed that appropriate injunctive relief could be fashioned if respondents' claims were upheld. But the fashioning of any injunctive relief would require the district court itself to determine the training, weapons, and orders appropriate for civil disturbance control. This is not the kind of determination that courts are equipped to make or are expected to make under our system of allocation of governmental powers; it is a matter which requires the technical skills and information that the military authorities possess, and which they alone are qualified to decide.

The extent of judicial intervention in military affairs which would be likely to result if this suit could be maintained is illustrated by the relief which respondents request—that future use of the Ohio National Guard for the control of civil disturbances on the Kent State campus be enjoined until the Guard has been "competently trained in techniques of civilian disorder control, * * * provided with the best available non-lethal equipment for use in civilian disorder control, * * * instructed not to use deadly force except in the case of actual self-defense or upon persons who have actually used or threatened the use of deadly force and * * * ordered not to carry live ammunition loaded in their guns when engaged in such control of civilian disorders * * *" (App. 11). Respondents thus

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seek, and the court of appeals apparently has authorized, "a broad-scale investigation, conducted by [respondents] as private parties armed with the subpoena power of a federal district court and the power of cross-examination, to probe into the [National Guard's civil disturbance control techniques] * * * with the district court determining at the conclusion of that investigation the extent to which those [techniques] may or may not be appropriate * * *." *Laird* v. *Tatum,* 408 U.S. 1, 14. Such judicial control of the National Guard's training, weapons and orders constitutes a "forbidden judicial intrusion into the administrative domain." *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U.S. 658, 670.

Furthermore, the broad-scale investigation required by respondents' complaint, as construed by the court of appeals, lacks the specificity required for adjudication. Respondents challenge not merely particular rules or activities but the general propriety of the Guard's training, weapons, and orders with respect to civil disorders. Justiciability requires "that clear concreteness provided when a question emerges precisely framed and necessary for decision * * *." *United States* v. *Fruehauf,* 365 U.S. 146, 157. Respondents, however, seek the kind of comprehensive review appropriate to a legislative committee; this is a task for which the judiciary is ill-suited. The courts should not be asked to function "as virtually continuing monitors of the wisdom and soundness of Executive action * * *." *Laird* v. *Tatum, supra,* 408 U.S. at 15.

These considerations concerning the proper allocation of judicial and executive responsibilities are especially telling in the instant case. The inquiries in which respondents would involve the judiciary—such as whether the Ohio Guard has been "competently trained in techniques of civilian disorder control" and "provided with the best available nonlethal equipment for use in civilian disorder control"—call for the kind of specialized knowledge and skills that the judiciary does not possess. For example, what standards is the district court to apply in determining whether members of the Ohio National Guard have been "competently trained?" Is the court to attempt to evaluate the adequacy of the instruction, the caliber of the instructors, and the sufficiency of the examination and evaluation made upon completion of the training? Presumably the military authorities have selected what they consider "the best available" equipment for use in civilian disorder control; is the district court to make its own independent evaluation, on the basis of possibly conflicting expert testimony, whether there are other kinds or brands of equipment that would be better? Is the district court's role in this inquiry to be the traditional one of reviewing the propriety of administrative action—to determine whether it is arbitrary and capricious—or is the court expected to decide these questions *de novo,* as if it were the military authorities prescribing the Guard training? Either standard of inquiry would be inappropriate; the determination of the proper way in which to prepare members of the National Guard

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for the performance of their military duties must be made by the military. Cf. *McAbee* v. *Martinez*, 291 F. Supp. 77 (D. Md.). As this Court noted in *Orloff* v. *Willoughby*, 345 U.S. 83, 93–94:

> * * * [J]udges are not given the task of running the Army. * * * Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Moreover, respondents seek not only judicial control of the training of the National Guard, but also judicial prescription of the precise way in which the Guard should operate when dealing with civilian disorders. Thus, respondents seek an injunction prohibiting the Guard from using "deadly force except in the case of actual self-defense or upon persons who have actually threatened the use of deadly force." That kind of an injunction, however, would be singularly inappropriate as a device for controlling the operations of the National Guard, and could result in the very kind of bloodshed and loss of life that the respondents apparently are seeking to prevent.

The determination whether to use force, in what circumstances and in what amount, can be made only in the light of the actual civilian disturbance as it exists, and not in advance in a theoretical context. The decisions with respect to the appropriate techniques to be employed to control civil disturbances must be made on the spot, in the light of the actual situation facing the troops, and with the benefit of the accumulated experience in dealing with this sensitive

problem that only the military authorities, and not the courts, can possibly possess.

The use of an injunction to control this aspect of the National Guard's activities would be particularly ill-advised. Commanders at the scene of a civil disorder might be reluctant to use their best military judgment with respect to what is the most suitable method of dealing with the situation if there was lurking in the background the possibility that a court subsequently would conclude that their actions went beyond what the injunction permits and therefore constituted contempt. The military authorities cannot properly perform their duties within the constraint of a judicial order telling them how to operate—an order necessarily made without knowledge of the specific facts with which the military will be confronted when they are called on to act. For the Guard to carry out its responsibility for maintaining civil order, it must retain operational flexibility. The occasions when plans to deal with civil disturbances must be put into effect are always full of stress and unpredictability. The authority to improvise or reformulate plans as necessity requires is essential in such circumstances. Judicially imposed limitations would seriously interfere with the Guard's ability to control disorders.

III. RESPONDENTS HAVE NO STANDING TO MAINTAIN THIS SUIT

In order to have standing to challenge the propriety of current National Guard practices and

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policies, respondents must demonstrate "a personal stake in the outcome of the controversy." *Baker* v. *Carr,* 369 U.S. 186, 204.[9] There must be "a logical nexus between the status asserted and the claim sought to be adjudicated * * *" (*Flast* v. *Cohen,* 392 U.S. 83, 102), which can be established only by a showing of "specific present objective harm or a threat of specific future harm." *Laird* v. *Tatum,* 408 U.S. 1, 14. See, also, *Linda R. S.* v. *Richard D.,* No. 71–6078, decided March 5, 1973; *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 166–167; *Sierra Club* v. *Morton,* 405 U.S. 727, 731–732.

Respondents attempt to meet this requirement of "a personal stake" by alleging that as a consequence of the Guard's activities at Kent State during May 1970, they are presently intimidated from exercising their "rights of lawful assembly, speech and association" (Br. 3) and are threatened with future "deprivations of life and liberty without due process of law" (*ibid.*). But as we shall show, these putative injuries are remote and hypothetical; "on this record the respondents have not presented a case for resolution by the courts." *Laird* v. *Tatum, supra,* 408 U.S. at 15.

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[9] This requirement of "a personal stake" is not simply imposed as a device for exercising judicial restraint. The jurisdiction of Article III courts rests upon the existence of a genuine case or controversy, and standing is necessary to ensure "that concrete adverseness" (*Baker* v. *Carr, supra,* 369 U.S. at 204) which is the prerequisite of a case or controversy in the constitutional sense. See *Linda R. S.* v. *Richard D.,* No. 71–6078, decided March 5, 1973 (slip op., p. 3).

A. RESPONDENTS HAVE NOT IDENTIFIED A SUFFICIENT THREAT OF SPECIFIC FUTURE HARM TO JUSTIFY INVOKING THE JUDICIAL PROCESS

Respondents claim (Br. 22–26) that the "rules, procedures and operating methods followed by the Ohio National Guard" (Br. 2) subject them to a continuing threat of future deprivations of their constitutional rights. But their claim of future harm is wholly speculative. Respondents base their claim upon the single incident at Kent State in May 1970, and ignore the substantial revisions that have since been made in Guard policy which eliminate much of the source of their concern.

1. The single incident at Kent State in May 1970 does not pose a sufficient threat of repetition to warrant judicial intervention.

Whether respondents have standing to maintain this suit depends, in the first instance, not upon the seriousness but upon the likelihood of the asserted prospective injury. It is the imminence and probability of harm that provides the concreteness necessary to establish a case or controversy appropriate for judicial resolution. Cf. *Poe* v. *Ullman,* 367 U.S. 497. A litigant has no standing to complain about threatened injury that is remote or speculative. See *Ex parte Levitt,* 302 U.S. 633, 634.

We are not unmindful of those decisions cited by respondents which have indicated, following this Court's opinion in *Hague* v. *C.I.O.,* 307 U.S. 496, that courts may appropriately provide "injunctive or declaratory relief based on claims that police or

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other agencies of state or local government were engaging or had engaged in deprivations of constitutionally secured rights" (Br. 17). See, *e.g.*, *Lewis* v. *Kugler*, 446 F. 2d 1343 (C.A. 3); *Schnell* v. *City of Chicago*, 407 F. 2d 1084 (C.A. 7); *Gomez* v. *Layton*, 394 F. 2d 764 (C.A. D.C.). However, as the Second Circuit has pointed out, "[t]he very statement of [the facts] of these cases shows their inapplicability to a situation involving a single although grave failure by the police to discharge their responsibilities, followed by speedy criticism and the taking of corrective measures * * *." *Belknap* v. *Leary*, 427 F. 2d 496, 499 (C.A. 2).[10]

In *Hague* itself, city authorities had, over a long period of time, directed an active and pervasive program of harassment against the plaintiffs, and had

[10] *Belknap* was an action under 42 U.S.C. 1983 to restrain New York City police from failing to accord anti-war protesters protection against physical assaults by counter-protesters at future demonstrations. Plaintiffs pointed to one previous demonstration where authorities were allegedly negligent in failing to protect them from such assaults. The court contrasted this single dereliction by police, which it concluded was an inadequate basis to justify injunctive relief, with the facts in cases like *Cottonreader* v. *Johnson*, 252 F. Supp. 492 (M.D. Ala.) and *Lankford* v. *Gelston*, 364 F. 2d 197 (C.A. 4), upon both of which respondents rely. The court noted (427 F. 2d at 499) that in *Cottonreader* "the defendants, including the Mayor and Chief of Police, over a period of months had themselves intimidated and harassed the plaintiffs as well as permitting other citizens to intimidate, threaten and assault them," and that *Lankford* involved "an instance of large scale police violation of the Fourth Amendment which * * * 'on a smaller scale has routinely attended efforts to apprehend persons accused of serious crime'" (*ibid.*).

expressed their intent to continue such activities indefinitely. In the present case, on the other hand, there is no allegation of a continuing policy and practice of interfering with the exercise and enjoyment of constitutional rights. Standing is predicated solely upon a single, although momentous, tragic incident. But that event, by itself, does not pose a sufficient "threat of specific future harm." [11]

Since respondents' claim of future injury is wholly speculative, even as students at Kent State they have no greater standing to challenge the propriety of current National Guard training, weapons, and orders than do any other residents of Ohio. And mere status as a resident does not confer standing to sue. Cf. *Tileston* v. *Ullman*, 318 U.S. 44.[12]

2. Respondents have no standing for the further reason that the National Guard practices and policies on which their case is based no longer exist

In *Belknap* v. *Leary*, *supra*, the Second Circuit, in addition to pointing out that only a single incident of

[11] Respondents' allegation of past injury does not confer standing here. This case does not involve an inquiry into the adequacy of the training or the propriety of the weapons and orders of the National Guard units involved in the shootings at Kent State. Cf. *Scheuer* v. *Rhodes*, petition for a writ of certiorari pending, No. 72-914. Respondents instead seek an investigation into current practices and policies and request prospective relief. Past injury is irrelevant to a "personal stake" in the granting of prospective relief, in the absence of a showing that recurrence of the injury is likely.

[12] Respondents do not allege standing as taxpayers, but since this case does not involve the spending power such an allegation would in any event be unavailing. *Flast* v. *Cohen*, 392 U.S. 83.

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unlawful police action had been alleged, emphasized (427 F. 2d at 499) that corrective measures were taken by the city shortly after the incident giving rise to the litigation occurred. Similarly, in *Laird* v. *Tatum, supra,* this Court noted (408 U.S. at 8) that "the Army's review of the needs of its domestic intelligence activities has indeed been a continuing one and * * * those activities have since been significantly reduced." Thus in both cases the existence of recently introduced corrective measures was a significant factor supporting the conclusion that judicial intervention was unwarranted.

In this case, also, there have been significant changes in official policies and practices (see pp. 12–15 *supra*), and these changes further illustrate the speculative nature of respondents' allegations of future harm. For example, respondents assert (Br. 4):

> The conditions alleged to be casually related to the deprivations include failure adequately to provide Ohio National Guard troops with specialized civil disorder training or with adequate equipment to respond to civilian disorders with non-deadly force, causing troops to carry live bullets in their guns and failing to properly instruct troops as to the legal limits on their use of deadly force.

According to respondents (Br. 2–3), because there has been "a continuation of the same rules, procedures and operating methods followed by the Ohio National Guard, [there is] * * * a substantial threat of repetition of similar acts * * * [in the future]." Respondents, however, ignore the substantial changes

that have been made in the policies and practices that they condemn.

As indicated above (p. 10, *supra*), mandatory "specialized civil disorder training" has since 1971 been required for all new National Guard enlistees; the training is given by regular Army personnel while the guardsman is serving his initial tour of active duty. This training includes separate instruction in such subjects as "stress training," "campus and open area operation," "riot control agents and munitions," and "individual responsibilities and standards of conduct." [13] After his initial training, the guardsman receives regular refresher courses in civilian disorder training. See pp. 11–12, *supra*.

Respondents have stressed the Ohio National Guard's policies with respect to the use of force. But this is the area where the most dramatic changes in state policy have occurred. At the time of the Kent State shootings, the Ohio National Guard's operations plan provided that "when rioters to whom the Riot Act has been read cannot be dispersed by any other reasonable means, then shooting is justified," and that during riot control duty "[r]ifles will be carried with a round in the chamber in a safe position." See p. 15, *supra*. Neither of these directives is in effect today. As we have shown (p. 15, *supra*), Ohio has adopted verbatim the regular Army's use-of-force rules, which prohibit the carrying of loaded weapons and carefully delineate and restrict the situations where use of deadly force may be employed.

[13] See Army Subject Schedule 19–6, note 2, *supra*.

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In view of these changes in state practice and policy, there is no basis for any substantial claim that the conditions that gave rise to the Kent State shootings are likely to be repeated. For this reason respondents' claim lacks the adverseness and immediacy that is necessary before courts may properly act.

B. RESPONDENTS' SUGGESTION OF A "CHILLING" EFFECT ON THEIR FIRST AMENDMENT RIGHTS IS INSUBSTANTIAL

Respondents suggest that they are presently suffering injury because the practices and policies of the Ohio National Guard intimidate them in the exercise of their First Amendment rights.[14] This "chilling"-effect argument typically is made where, as in *Laird* v. *Tatum, supra,* the executive activity allegedly giving rise to the putative chill is ongoing and not merely potential. Here, of course, there is no ongoing event or program which respondents will inevitably confront; they allege merely that such an event (*i.e.,* the recalling of the National Guard to the Kent State campus) may occur at some unspecified time in the future. Thus any "chilling" effect stems only from present fears of uncertain harm at some indefinite time in the future. Since, as we have shown, respondents cannot show a threat of specific future harm here, *a fortiori* any claim of present First Amendment deprivation must fall as well.

This case has strong overtones because it arises out of a great national tragedy. It involves, however, an area which is particularly inappropriate for judicial

[14] While respondents do not here expressly assert a "chilling" effect, that claim appears to be implicit in their contentions when viewed as a whole. See, *e.g.*, App. 6; Br. 2–3.

supervision and control: the operations of the military. It is our position that courts should not intervene in this sensitive area unless the plaintiffs have clearly shown that they are likely to undergo specific injury from the practices they challenge. Cf *Laird* v. *Tatum, supra.* The respondents have not made such a showing.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, with directions that the complaint be dismissed.

Respectfully submitted.

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MARCH 1973.

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APPENDIX A

Paragraphs 4–11, 4–12, and 5–9 of Army Field Manual 19–15, "Civil Disturbances," dated March 22, 1972, provide:

4–11. General.

a. Operations by Federal forces will not be authorized until the President is advised by the highest officials of the State that the situation cannot be controlled with the non-Federal resources available. The task force commander's mission is to help restore law and order and to help maintain it until such time as State and local forces can control the situation without Federal assistance. In performing this mission, the task force commander may find it necessary to participate actively not only in quelling the disturbance but also in helping to detain those responsible for it. Task force commanders are authorized and directed to provide such active participation, subject to the restraints on the use of force set forth herein.

b. The primary rule which governs the actions of Federal forces in assisting State and local authorities to restore law and order is that a task force commander must at all times use only the minimum force required to accomplish his mission. This paramount principle should control both the selection of appropriate operational techniques and tactics and the choice of options for arming the troops (para 5–9). Pursuant to this principle, the use of deadly force; i.e., live ammunition or any other type of physical force likely to cause death or serious bodily harm, is authorized only under extreme circumstances where

certain specific criteria are met (para 4–12*b*). To emphasize limitations on use of firepower and to restrict automatic fire, commanders will insure that rifles with only a safe or semiautomatic selection capability, or rifles modified to have only a safe or semiautomatic selection capability, will be used as the basic weapon for troops in a civil disturbance area.

c. All personnel, prior to participation in civil disturbance operations, will be briefed as to—

(1) The specific mission of the unit.

(2) Rules governing the application of force as they apply to the specific situation.

(3) A psychological orientation on the local situation, specifically addressing types of abuse which military personnel may be expected to receive and the proper response to these types of abuse.

4–12. Use of Nondeadly and Deadly Force.

a. Task force commanders are authorized to use nondeadly force to control the disturbance, to prevent crimes, and to apprehend or detain persons who have committed crimes; but the degree of force used must be no greater than that reasonably necessary under the circumstances. The use of deadly force, however, in effect invokes the power of summary execution and can therefore be justified only by extreme necessity. Accordingly, its use is not authorized for the purpose of preventing activities which do not pose a significant risk of death or serious bodily harm (e.g., curfew violations or looting). If a mission cannot be accomplished without the use of deadly force, but deadly force is not permitted under the guidelines authorizing its use, accomplishment of the mission must be delayed until sufficient nondeadly force can be brought to bear. The commander should report the situation and seek instructions from higher au-

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thority. All the requirements of *b*, below, must be met in every case in which deadly force is employed.

b. The use of deadly force is authorized only where all three of the following circumstances are present:

(1) Lesser means have been exhausted or are unavailable; and

(2) The risk of death or serious bodily harm to innocent persons is not significantly increased by its use; and

(3) The purpose of its use is one or more of the following:

(*a*) Self-defense to avoid death or serious bodily harm (*c*, below);

(*b*) Prevention of a crime which involves a substantial risk of death or serious bodily harm (for example, setting fire to an inhabited dwelling or sniping), including the defense of other persons;

(*c*) Prevention of the destruction of public utilities or similar property vital to public health or safety; or

(*d*) Detention or prevention of the escape of persons who have committed or attempted to commit one of the serious offenses referred to in (*a*), (*b*), and (*c*) above.

c. Every soldier has the right under the law to use reasonably necessary force to defend himself against violent and dangerous personal attack. The limitations described in this paragraph are not intended to infringe this right but to prevent the unauthorized or indiscriminate firing of weapons and the unauthorized or indiscriminate use of other types of deadly force.

d. In addition, the following policies regarding the use of deadly force will be observed:

(1) When firing ammunition, the marksman should, if possible, aim to wound rather than to kill.

(2) When possible, the use of deadly force should be preceded by a clear warning to the individual or group that use of such force is contemplated or imminent.

(3) Warning shots are not to be employed. Such firing constitutes a hazard to innocent persons and can create the mistaken impression on the part of citizens or fellow law enforcement personnel that sniping is widespread.

(4) Even when its use is authorized pursuant to *b*, above, deadly force must be employed only with great selectivity and precision against the particular threat which justifies its use. For example, the receipt of sniper fire—however deadly—from an unknown location can never justify "returning the fire" against any or all persons who may be visible on the street or in nearby buildings. Such an indiscriminate response is far too likely to result in casualties among innocent bystanders or fellow law enforcement personnel; the appropriate response is to take cover and attempt to locate the source of the fire so that the threat can be neutralized in accordance with *e*, below.

e. Task force commanders are authorized to have live ammunition issued to personnel under their command. Individual soldiers will be instructed, however, that they may not load their weapons (place a round in the chamber) except when authorized by an officer or, provided they are not under the direct control and supervision of an officer, when the circumstances would justify their use of deadly force pursuant to *b*, above. Retention of control by an officer over the loading of weapons until such time as the need for such action is clearly established is of critical importance in preventing the unjustified use of deadly force. Whenever possible, command and control arrangements

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should be specifically designed to facilitate such careful control of deadly weapons.

f. The presence of loaded weapons in tense situations may invite the application of deadly force in response to provocations which while subject to censure, are not sufficient to justify its use; and it increases the hazard that the improper discharge of a weapon by one or more individuals will lead others to a reflex response on the mistaken assumption that an order to fire has been given. Officers should be clearly instructed, therefore, that they have a personal obligation to withhold permission for loading until circumstances indicate a high probability that deadly force will be imminently necessary and justified pursuant to the criteria set forth in *b*, above. Strong command supervision must be exercised to assure that the loading of weapons is not authorized in a routine, premature, or blanket manner.

g. Task force commanders should at all times exercise positive control over the use of weapons. The individual soldier will be instructed that he may not fire his weapon except when authorized by an officer, or provided he is not under the direct control and supervision of an officer, when the circumstances would justify his use of deadly force pursuant to *b*, above. He must not only be thoroughly acquainted with the prerequisites for the use of deadly force, therefore, but he must also realize that whenever his unit is operating under the immediate command and control of an officer, that commander will determine whether the firing of live ammunition is necessary.

h. Task force commanders may at their discretion delegate the authority to authorize the use of deadly force, provided that such delegation is not inconsistent with this paragraph and that the person to whom such

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delegation is made understands the constraints upon the use of deadly force set forth in *b*, above.

* * * * *

5–9. Techniques for Crowd Control.

There are numerous techniques designed to provide the commander with flexibility of action in accomplishing crowd control. He must select a combination of techniques which will produce the desired results within the framework of the selected crowd control option. The most common techniques appropriate for military usage are discussed below:

a. Observation. This consists of the deployment of individuals or teams to the periphery of a crowd for the purpose of monitoring its activity. It includes gathering information on crowd size, location, mood, and reporting on the developing situation. This technique includes posting individuals on strategic rooftops and other high terrain overlooking the crowd. This latter measure provides additional security to control force personnel should they be committed to other crowd control operations. Such a team may be composed of an expert marksman, a radio operator, and an observer equipped with binoculars. Care must be taken to assure that committed control forces are aware of the locations of such teams to preclude their being mistaken for sniper elements.

b. Communication of Interest and Intent. In certain situations effective communication with crowd and mob leaders and participants may enable the commander to control the situation without resort to more severe actions. When planned and organized demonstrations, marches or rallies within the disturbed area are announced, the control force commander in coordination with local authorities should meet with organizers of the activity in order to communicate the

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interest of the control forces. The following matters, as appropriate, should be discussed:

(1) Parade or demonstration permits.

(2) Location of demonstration and routes of march.

(3) Time limits for the activity.

(4) Provision of marshals by activity organizers.

(5) Prevention of violence.

(6) Safety of all concerned.

The task force commander and local authorities should also communicate to the activity organizers their intent to cope with violence, unlawful actions and violations of restrictions imposed on the activity. It is intended that, by this communication between activity organizers and control force personnel, the demonstration, rally or parade will occur without incident through the mutual cooperation of all concerned. The intentions of control forces will not be effective if delivered as an ultimatum. A limited, begrudging dialogue with activity organizers reduces the opportunity for authorities to learn the plans of the demonstrators. It must be remembered that, if this communication is not effected, the activity organizers might well hold the demonstration in defiance of local authorities, thereby creating a potential for violence that might not have existed if this technique had been employed.

c. Selection of Force Options.

(1) The commitment of Federal military forces must be viewed as a drastic last resort. Their role, therefore, should never be greater than is absolutely necessary under the particular circumstances which prevail. This does not mean, however, that the number of troops employed should be minimized. To the contrary, the degree of force required to control a disturbance is frequently inversely proportionate to the number of available personnel. Doubts concerning the

number of troops required, therefore, should normally be resolved in favor of large numbers since the presence of such large numbers may prevent the development of situations in which the use of deadly force is necessary. A large reserve of troops should be maintained during civil disturbance operations. The knowledge that a large reserve force is available builds morale among military and law enforcement personnel and contributes toward preventing overreaction to provocative acts by disorderly persons.

(2) In selecting an operational approach to a civil disturbance situation, the commander and his staff must adhere scrupulously to the "minimum necessary force" principle; for example, riot control formations or riot control agents should not be used if saturation of the area with manpower would suffice.

(3) Every effort should be made to avoid appearing as an alien invading force and to present the image of a restrained and well-disciplined force whose sole purpose is to assist in restoration of law and order with a minimum loss of life and property and due respect for those citizens whose involvement may be purely accidental. Further, while riot control personnel should be visible, *tactics or force concentrations which might tend to excite rather than to calm should be avoided where possible.*

(4) The measures described in (*a*) through (*g*), below, may be applied in any order as deemed appropriate by the responsible commander so long as their application is consonant with paragraph 4–12, and otherwise in keeping with the situation as it exists.

(*a*) *Proclamation.* A public proclamation is considered an excellent medium to make known to a crowd the intentions of the control force commander. In some instances, such a proclamation makes further action unnecessary. A proclamation puts the popula-

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tion on notice that the situation demands extraordinary military measures, prepares the people to accept military presence, tends to inspire respect from lawless elements and supports law-abiding elements, gives psychological aid to the military forces attempting to restore order, and indicates to all concerned the gravity with which the situation is viewed.

(*b*) *Show of force.* A show of force is effective in various situations in civil disturbance control operations. When a crowd has assembled in an area, marching a well-equipped, highly-disciplined control force into view may be all the force that is needed to persuade them to disperse and retire peaceably to their homes. When persons are scattered throughout the disturbance area in small groups, a show of force may take the form of motor marches of troops throughout the area, saturation patrolling, and the manning of static posts, or similar measures.

(*c*) *Employment of riot control formations.* Riot control formations are used to disperse massed mobs which do not react to orders of the control force instructing them to disperse and retire peaceably to their homes. The employment of such formations is part of the show of force and has a strong psychological effect on any crowd. While the use of fixed bayonets can add considerably to this effect, the danger of intentional or accidental injury to nonviolent participants or fellow law enforcement personnel precludes such use in situations where troops are in contact with a nonviolent crowd.

(*d*) *Employment of water.* Water from a firehose may be effective in moving small groups on a narrow front such as a street or in defending a barricade or roadblock. Personnel applying water should be protected by riflemen and in some instances by shields.

In the use of water, the factors discussed below should be considered.

1. Water may be employed as a flat trajectory weapon utilizing pressure, or as a high trajectory weapon employing water as rainfall. The latter is highly effective during cold weather.

2. The use of a large water tank (750 to 1,000 gallons) and a powerful water pump mounted on a truck with a high pressure hose and nozzle capable of searching and traversing will enable troops to employ water as they advance. By having at least two such water trucks, one can be held in reserve for use when required.

3. In using water, as with other measures of force, certain restraints must be applied. Using water on innocent bystanders such as women and children should be avoided; avenues of escape must be provided; and the more severe use, flat trajectory application, should be used only when necessary.

4. Since the fire departments normally are associated with lifesaving practices rather than maintenance of law and order, consideration should be given to maintaining this image of the fire departments through the use of other than fire department equipment when using water for riot control and crowd dispersal.

(*e*) *Employment of riot control agents.* Riot control agents are extremely useful in civil disturbance control operations because they offer a humane and effective method of reducing resistance and lessen the requirements for the application of more severe measures of force. Task force commanders are authorized to delegate the authority to use riot control agents and other forms of nondeadly force at their discretion.

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(*f*) *Fire by selected marksmen.* Fire by selected marksmen may be necessary under certain circumstances. Marksmen should be preselected and designated in each squad. Selected marksmen should be specifically trained and thoroughly instructed. They may be placed on vehicles, in buildings, or elsewhere as required.

(*g*) *Full firepower.* The most severe measure of force that can be applied by troops is that of available unit firepower with the intent of producing extensive casualties. This extreme measure would be used as a last resort only after all other measures have failed or obviously would be impractical, and the consequence of failure to completey subdue the riot would be imminent overthrow of the government, continued mass casualties, or similar grievous conditions. It has never been used by Federal troops in this century. See primary rule for use of force and restriction on use of automatic fire in paragraph 4–11*b*.

(5) The normal reflex action of the well-trained combat soldier to sniper fire is to respond with an overwhelming mass of fire power. In a civil disturbance situation, this tactic endangers innocent people more than snipers. The preferred tactic is to enter the building from which the fire originates. Darkening the street in order to gain protection from sniper fire is counterproductive. The following general approach should be emphasized in dealing with snipers:

(*a*) Surround the building in which the sniper is concealed and gain access, using armored vehicles if necessary and available.

(*b*) Illuminate the area during darkness.

(*c*) Employ agent CS initially, if feasible, rather than small arms fire. If CS is not successful, then use well-aimed fire by expert marksmen. The number

of rounds should be kept to a minimum to reduce the hazard to innocent persons.

(6) Consistent with the controlling principle that he must use only the minimum force necessary to accomplish his mission, the commander may select any one of the following options for arming his troops:

Rifle[3][4]	Bayonet scabbard	Bayonet	Ammunition magazine clip	Chamber
At sling	On belt	In scabbard	In pouch or belt	Empty.
At port	On belt	In scabbard	In pouch or belt	Empty.
At port	On belt	Fixed [1]	In pouch or belt	Empty.
At port	On belt	Fixed [1]	In weapon [2]	Empty.
At port	On belt	Fixed [1]	In weapon [2]	Round Chambered.

[1] See (4)(c) above.
[2] See paragraph 4–12f and g.
Rifles, if capable of automatic fire, must be modified to prevent automatic operation.
Troops may be armed with riot baton in lieu of rifles.

While each of the above options represents an escalation in the level of force, they are not sequential in the sense that a commander must initially select the first option, or proceed from one to another in any particular order. So long as the option selected is appropriate considering the existing threat, the minimum necessary force principle is not violated.

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APPENDIX B

As of May 1970, Ohio use-of-force rules, Annex F to OPLAN 2, provided:

1. Purpose: To provide commanders with information which must be disseminated to National Guard troops engaged in civil disturbances immediately prior to their employment. The information contained in paragraph 4 through 8 of this Annex will be read verbatim to troops by an officer of the unit.

2. Situation Briefing: In each instance when National Guard troops are to be employed, the commander will advise all troops of the following:

a. General situation.

b. Units to be employed and the command structure.

c. Passes, badges or other identification means to be honored permitting non-military personnel in the area.

d. Officers and key NCO's will maintain a record (by journal, log or diary) of orders or directives received and issued, resulting actions and any unusual incidents. Entries should include time, date and names.

3. Mission: The commander will state the mission of the organization and the portion for which his unit is responsible or the manner in which the company will be employed in carrying out the overall mission.

4. Individual Responsibility: As a member of this unit and the Ohio National Guard, you have a most serious and demanding individual responsibility. You are about to serve on one of the most difficult and unpleasant tasks that a soldier may be assigned. Re-

gardless of the actions and taunts of the rioters, you must remain the well-disciplined soldier. In short, you must look like a soldier, act like a soldier and remain fair and impartial under all circumstances.

5. Relationship With Civil Population: Our purpose is to restore and preserve peace among fellow citizens most of whom are friendly, but who will tolerate military control only to the extent necessary as the result of this emergency. When you display fairness and impartiality, scrupulously protect life and property, and exercise soldierly restraint under all conditions, you merit the respect and secure the cooperation of the civilian population. The temptation to use high handed methods may be great, but you must remain calm and retain your good judgment in order that you may act wisely regardless of personal feelings or beliefs. Do not fraternize with civilians or discuss with them at any time the circumstances of the military action.

6. Rules of Engagement: In any action that you are required to take, use only the minimum force necessary. When the Riot Act has been read within hearing, it is unlawful for any group of three or more people to remain unlawfully or riotously assembled and you may use necessary and proper means to disperse or apprehend them. Keeping groups from assembling prevents crowds which may become unruly and take mob action. Your use of force should be in the sequence listed below:

a. Issue a military request to disperse.

(1) Insure that an avenue of dispersal is available.

(2) Allow ample time for them to obey the order.

(3) Remain in area for sufficient time to prevent re-assembly.

b. Riot formations—show of force. Instructions in 6.a. (1) (2) (3) above apply.

c. Simple physical force, if feasible.

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d. Rifle butt and bayonet: If people do not respond to request, direction and order, and if simple physical force is not feasible, you have the rifle butt and bayonet which may be used in that order, using only such force as is necessary.

e. Chemicals. If people fail to respond to requests or orders, and riot formation and rifle butts or bayonets prove ineffective, chemicals (baseball grenades or jumping grenades) will be used on order when available. When large demands for chemicals are required a chemical squad will be dispatched to assist you upon request.

f. Weapons. When all other means have failed or chemicals are not readily available, you are armed with the rifle and have been issued live ammunition. The following rules apply in the use of firearms:

(1) Rifles will be carried with a round in the chamber in the safe position. Exercise care and be safety minded at all times.

(2) Indiscriminate firing of weapons is forbidden. Only single aimed shot at confirmed targets will be employed. Potential targets are:

(a) *Sniper*—(Determined by his firing upon, or in the direction of friendly forces or civilians) will be fired upon when clearly observed and it is determined that an attempt to apprehend would be hazardous or other means of neutralization are impractical.

(b) *Arsonist*—(Determined by acts of fire-setting of *inhabited* building or structure) will be fired on if there is apparent necessity and all other means of preventing the crime are first exhausted. That is, the arsonist on being ordered to halt during an attempt to apprehend, and failure to obey such order, where there is no other reasonable alternative, to prevent the escape of a felon from the scene of his felony.

(c) *Other*—In any instance where human life is endangered by the forcible, violent actions of a rioter, or when rioters to whom the Riot Act has been read cannot be dispersed by any other reasonable means, then shooting is justified.

(3) Full automatic weapons such as machine guns will be employed in riot control operations for their psychological effect. Such weapons will *not* be carried with a round in the chamber, but will be in a safe or half load position.

(4) When chemicals are employed and/or weapons fired, the report form issued to you with your ammunition will be completed and immediately brought to the company headquarters or reported by radio or telephone to me.

(Phone Nos. Unit Commanders)

g. Looters. Looters will be apprehended by using the minimum force necessary. Firing at looters will be undertaken only when directed by competent authority (i.e. when properly directed thru the entire chain of command).

7. Miscellaneous:

a. You will follow commands and orders of military commanders only—never those of civilian or police authorities.

b. Individual soldiers will not discuss operations with newsmen or others but refer them to an officer who will then direct them to the appropriate information source.

c. Actual search of persons, vehicles or buildings will be conducted by civilian police unless an *emergency* exists.

d. All law violators who are apprehended will be turned over to civil authorities.

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e. The following items will be particularly stressed in all preemployment briefings:

(1) *No* individual passes will be issued to troops during the civil disturbance operation.

(2) Personnel will not be permitted in bars or similar establishments except in the *most strict* sense of line of duty.

(3) Loaded weapons will not be carried into any commercial establishments except when specifically committed to the civil disturbance mission.

8. Summary:

a. The Riot Act has been read within hearing in the City of _____. You are here to restore law and order. The civilian population will judge you and the entire National Guard on your appearance and conduct. Act as a soldier and you will be obeyed. If force is necessary, use only that force which is necessary.

b. If there is absolute or apparent necessity and all other means of preventing the crimes of murder (such as sniper fire), robbery burglary, rape or arson (fire bombing of inhabited building or structure) have been exhausted, then life may be taken to prevent these forcible and atrocious crimes.

c. When the Riot Act has been read within hearing and you are engaged in dispersing or apprehending rioters, using necessary and proper means, then you are declared by Ohio Statute (RC 3761.15) to be guiltless if any of the persons unlawfully or violently assembled is killed, maimed or otherwise injured in consequence of resisting.

d. Use common sense and do only what is necessary to do and can be justified *afterwards.* Obey your orders! This is duty in time of public danger, which gives courts-martial full active duty punishing authority.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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Supreme Court, U. S.
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MAR 16 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1553

JOHN J. GILLIGAN, Governor of Ohio, DANA L. STEWART, Adjutant General of Ohio, ROBERT H. CANTERBURY, Assistant Adjutant General,

Petitioners,

—against—

CRAIG MORGAN, THOM DICKERSON, WILLIAM SLOCUM,

Respondents.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF RESPONDENTS TO *AMICUS CURIAE* BRIEF OF THE UNITED STATES

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Introductory Statement

Following the completion and filing of briefs in this case, the Solicitor General, on request of the Army, sought and was granted leave to file an *amicus curiae* brief in support of petitioners. Because the brief goes into some matters not dealt with in petitioners' briefs, respondents believe it is appropriate to reply to the new matters discussed in the brief of *amicus curiae*.[1] Due to the lateness of the date, the Clerk has granted permission for this brief to be filed

[1] For the remainder of this brief, the "brief of the United States as Amicus Curiae" will be referred to as "the government's brief" in contradistinction to the state's brief.

in typewritten form. A printed copy will shortly be forthcoming.

Argument

The government's brief devotes a certain amount of space to setting forth the relative roles of the Army and the Ohio National Guard, as separate units in control of training of National Guard members.[2] What is new about the government's brief, however, is the contention, not specifically made by the state, that Article III concepts of ripeness and mootness and related equity concepts of imminence of repetition and injury require the dismissal of this suit.

I.

Definition of Terms

As has been recognized before, terminology in the area of justiciability—which we can loosely define as the issue of appropriateness of the suit for judicial consideration—tends to run together and words defining related but different concepts spill over into each other. See *Baker* v. *Carr*, 369 U.S. 186 (1962). In respondents' main brief, a section devoted to discussion of "standing" dealt with the issue of whether respondents were the proper parties to bring suit. The government's brief uses "standing" to denote a different concept. The claim is that the danger of future injury is too remote and that the case is either "moot", i.e., too far in the past, or "unripe", i.e. the risk lies too hazily in the future. In the hope of maintaining separation of the concepts, this brief will refer to those notions as issues of mootness and ripeness and imminence.

[2] Significantly, the government's brief demonstrates at page 9, that when the National Guard is used in control of civilian disorder it functions as a police force under state control.

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II.

Imminence

The imminence claim of the government is basically that the risk of future injury is "wholly speculative" (Govt.'s Brief, p. 24). They contend that the issue is not what happened in the past but rather what may happen in the future. In a certain sense, the argument is a bit disingenuous. If there had been no incident and injuries in the past and simply the claim was made that the way in which the National Guard functioned created a risk of future injury, we seriously doubt that the government would concede the issue of justiciability. Cf. *Davis* v. *Ichord,* 442 F.2d 1207 (D.C. Cir. 1970).

More fundamentally what makes this case an actual controversy is the past wrongdoing. It is the specific allegations of injuries suffered and acts committed which takes this case out of the realm of speculation and provides the concreteness and adverseness normally necessary for adjudication. Cf. *Lankford* v. *Gelston,* 364 F.2d 197 (4th Cir. 1966).

The best way to analyze the issue of whether, assuming past wrongdoing, there is sufficient imminence is by stages. The first stage is whether the complaint properly alleges the matter. The allegations are that the "actions and operating methods of the Ohio National Guard, together with a continuation of the same rules, procedures and operating methods . . . creates a substantial threat of repetition of similar acts . . . " (Complaint, Para. 11, Appendix p. 6). The only basis for contesting that allegation as a matter of law is the government's contention (Govt.'s Brief, pp. 22-24) that "one incident" is not enough. It is hard to

imagine a sound reason why one incident is not enough if the goal of equity, or even declaratory relief, is to prevent future harm. Assuming proof of wrongdoing and proof that conditions continue, giving credence to a wrongdoer's claim that the wrong hasn't been committed twice is contrary to common sense and defeats the protective role of government.

Moreover, there is ample precedent for relief. *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966) (mass search) was certainly "one incident" in the way in which the government uses the concept to describe this case. So too was *Sterling* v. *Constantin*, 287 U.S. 378 (1932).

III.

Mootness

Assuming a good complaint then, the second stage of analysis is whether, since the time of its filing, matters have changed so as to make the claim for relief now moot. Cf. *Hall* v. *Beals*, 396 U.S. 45 (1969). As a purely legal matter, a controversy is moot only if it is incapable of repetition. *United States* v. *W. T. Grant*, 345 U.S. 629 (1953). The other aspect of the issue—whether the conditions have been corrected so as to make an injunction unnecessary—is basically a question of fact. Both the state —in its Suggestion of Mootness—and the government—in its brief—set forth facts which, *if true, might* make *some* of the relief requested unnecessary. The only way to resolve the truth of such claims is by trial. Assumptions like that in the government's brief that everything the Army asserts about its training is a full reflection of reality

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have been proved to be too optimistic in the past.[3] If necessary, respondents believe it can be proved that Ohio National Guard officials have engaged in a series of misrepresentations respecting the nature of the incidents leading to this suit.[4] A related assumption—that the defendants and their agents are all engaged in a good faith effort to change the Ohio National Guard's conduct in civilian disorders—is likewise one which cannot pass unquestioned without some proof. The only certainty is that the fact of change and correction, like the fact of wrongdoing, can only be proved after trial.

IV.

The Relief Sought

An additional assumption in the government's brief is that, if change in the conditions respecting the Ohio National Guard's training is proved, no relief would be warranted. A part of the relief sought, however, relates not to training and weapons but rather to orders. See Brief of Respondents, pp. 4-6. One aspect of that issue is the claim that the Ohio National Guard acted as a military force empowered to suspend rights rather than as a police

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[3] The Pentagon Papers, involved in *New York Times* v. *United States*, 403 U.S. 713 (1971), demonstrate a continuing risk that the executive branch can see deception, half-truth and semantic distinction as legitimate in pursuit of its goals. Another instance is the Army's treatment of obligations of honesty in connection with surveillance data banks. See Report, Army Surveillance of Civilians: A Documentary Analysis, Committee on the Judiciary, U.S. Senate, 92nd Cong., 2nd Sess., 95 et seq. (1972).

[4] The most obvious is the attempt to justify the shooting into a crowd by troops in response to sniper fire. See *e.g.*, Columbus Citizen-Journal, May 5, 1970, p. 1, col. 6.

force. As to that claim, and others, a district court might well conclude that an injunction was not warranted but that a declaratory judgment was most appropriate. Cf. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967).

V.

"Chilling Effect"

The government's brief attempts to characterize respondent's claim of standing as one ultimately dependent upon the "chilling effect" on exercise of constitutional rights allegation apparently rejected in *Laird* v. *Tatum,* 408 U.S. 1 (1972). Here, however, the claim of past injury rests on concrete past harms which resulted, it is alleged, from specific wrongdoings. To the extent that inhibition of exercise of the right of assembly and public demonstration has pertinence in this case, it has it only insofar as there is an independent legal claim of wrongdoing—actually the several specified in the complaint—and an independent basis for relief—the risk of future shootings, future physical interference with lawful assembly, future beatings and the like. Thus, chilling effect can only be relevant here as an *additional* basis for a district court to grant relief if it found wrongdoing and *other* injury.

So viewed, this case is fundamentally different from *Laird* v. *Tatum,* 408 U.S. 1 (1972). (See the discussion of *Laird* in respondents' brief on p. 26, n.24). As the Court characterized the claim it rejected in *Laird,* it was that governmental conduct otherwise lawful can be made unlawful because it has a "chilling effect." The conduct alleged in this case is unlawful irrespective of any chilling effect because it effects a deprivation of specifically protected constitutional rights.

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Moreover, a related claim made for *Laird* in the government's brief, and apparently for *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), that the military's conduct of its own affairs is not reviewable by a court, is not supported by those cases. Since the Court characterized the army surveillance in *Laird* as not effecting a deprivation of a specific *constitutional right*, it was easy to see the remainder of the claim as essentially one of policy. Similarly, in *Orloff*, the only claim left to be adjudicated was whether the Army ought to commission a particular physician, a claim of policy rather than recognized legal right. What is common to both cases is the absence, or rejection, of the claim that the Army's conduct effected a deprivation of constitutional rights of civilians. It is contrarily true, however, that when it is fairly alleged, or proved, that military conduct effects a deprivation of a constitutional right of a civilian, the case becomes appropriate and necessary for judicial inquiry and redress. See, e.g., *Reid* v. *Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1956); *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946). Cf. *O'Callahan* v. *Parker*, 395 U.S. 258 (1969). It would be inconsistent with a fairly solid line of decisions[5] to read *Laird* as holding that despite a claim of deprivation of a specific constitutional right, military conduct could not be examined because of a claim of superior expertise.

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[5] The cases are summarized in *Respondents' Brief*, pp. 31-34 and extensively in the *amicus curiae* brief of the Law Revision Center.

CONCLUSION

For the foregoing reasons, as well as those explored in earlier briefs, it is apparent that the complex issues of justiciability and related doctrines involved in this case can only be resolved after a trial on the merits.

Respectfully submitted,

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Slip Opinion

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GILLIGAN, GOVERNOR OF OHIO, ET AL. *v.* MORGAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71–1553. Argued March 19, 1973—Decided June 21, 1973

Respondents filed this action on behalf of themselves and all other students at a state university, claiming that during a period of civil disorder on the campus in May 1970, the National Guard, called by the Governor to preserve order, violated students' rights of speech and assembly and caused injury and death to some students. They sought injunctive relief to restrain the Governor in the future from prematurely ordering Guard troops to duty in civil disorders and an injunction to restrain Guard leaders from future violation of students' rights. They also sought a declaratory judgment that § 2923.55 of the Ohio Revised Code is unconstitutional. The District Court dismissed the suit on the ground that the complaint failed to state a claim upon which relief could be granted. The Court of Appeals affirmed the dismissal with respect to both injunctive relief against the Governor's "premature" employment of the Guard and the validity of the state statute, but held that the complaint stated a cause of action with respect to one issue, which was remanded to the District Court with directions to resolve the question whether there was and is "a pattern of training, weaponing and orders in the Ohio National Guard which . . . require . . : the use of fatal force in suppressing civilian disorders when the total circumstances are such that nonlethal force would suffice to restore order . . . ." Since the complaint was filed, the named respondents have left the university; the officials originally named as defendants no longer hold offices in which they can exercise authority over the Guard; the Guard has adopted new and substantially different "use-of-force" rules; and the civil disorder training of Guard recruits has been revised. *Held:*

Syllabus

1. The case is resolved on the basis of whether the claims alleged in the complaint, as narrowed by the Court of Appeals' remand, are justiciable, rather than on possible mootness. P. 3.

2. No justiciable controversy is presented in this case, as the relief sought by respondents, requiring initial judicial review and continuing judicial surveillance over the training, weaponing, and standing orders of the National Guard, embraces critical areas of responsibility vested by the Constitution, see Art. I, § 8, cl. 16, in the Legislative and Executive Branches of the Government. Pp. 3–10.

456 F. 2d 608, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which POWELL, J., joined. DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., would vacate the judgment of the Court of Appeals and remand to the District Court to dismiss as moot.

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SUPREME COURT OF THE UNITED STATES

No. 71–1553

John J. Gilligan, Governor of Ohio, et al., Petitioners, *v.* Craig Morgan et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 21, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Respondents, alleging that they were full-time students and officers in the student government at Kent State University in Ohio, filed this action [1] in the District Court on behalf of themselves and all other students on October 15, 1970. The essence of the complaint is that, during a period of civil disorder on and around the University campus in May 1970, the National Guard, called by the Governor of Ohio to preserve civil order and protect public property, violated students' rights of speech and assembly and caused injury to a number of students and death to several, and that the actions of the National Guard were without legal justification. They sought injunctive relief against the Governor to restrain him in the future from prematurely ordering National Guard troops to duty in civil disorders and an injunction to restrain leaders of the National Guard from future violation of the students' constitutional rights. They also sought a declaratory judgment that § 2923.55

[1] The complaint was brought under 42 U. S. C. § 1983 (1970) with jurisdiction asserted under 28 U. S. C. § 1343 (3) (1970).

of the Ohio Revised Code [2] is unconstitutional. The District Court held that the complaint failed to state a claim upon which relief could be granted and dismissed the suit. The Court of Appeals [3] unanimously affirmed the District Court's dismissal with respect to injunctive relief against the Governor's "premature" employment of the Guard on future occasions and with respect to the validity of the state statute.[4] At the same time, however, the Court of Appeals, with one judge dissenting, held that the complaint stated a cause of action with respect to one issue which was remanded to the District Court with directions to resolve the following question:

> "Was there and is there a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that nonlethal force would suffice to restore order and the use of lethal force is not reasonably necessary." [5]

We granted certiorari to review the action of the Court of Appeals.[6]

I

We note at the outset that since the complaint was filed in the District Court in 1970, there have been a number of changes in the factual situation. At the oral

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[2] This section provides that, under certain circumstances, law enforcement personnel who are engaged in suppressing a riot are "guiltless" for the consequences of the use of necessary and proper force.

[3] The opinion of the Court of Appeals is reported *sub nom. Morgan v. Rhodes*, at 456 F. 2d 608 (1972).

[4] Respondents have not sought certiorari with respect to those claims.

[5] 456 F. 2d, at 612.

[6] 409 U. S. 947 (1972).

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argument, we were informed that none of the named respondents is still enrolled in the University.[7] Likewise, the officials originally named as party defendants no longer hold offices in which they can exercise any authority over the State's National Guard,[8] although the suit is against such parties and their successors in office. In addition, both the petitioners, and the Solicitor General appearing as *amicus curiae*, have informed us that since 1970 the Ohio National Guard has adopted new and substantially different "use-of-force" rules differing from those in effect when the complaint was filed; we are also informed that the initial training of National Guard recruits relating to civil disorder control [9] has been revised.

Respondents assert, nevertheless, that these changes in the situation do not affect their right to a hearing on their entitlement to injunctive and supervisory relief. Some basis therefore exists for a conclusion that the case is now moot; however, on the record before us we are not prepared to resolve the case on that basis and therefore turn to the important question whether the claims alleged in the complaint as narrowed by the Court of Appeals remand are justiciable.

II

We can treat the question of justiciability on the basis of an assumption that respondents' claims, within the framework of the remand order, are true and could be established by evidence. On that assumption we address the question whether there is any relief a District Court could appropriately fashion.

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[7] Tr. of Oral Arg., 25, 33.

[8] Memorandum of Petitioners Suggesting a Question of Mootness, 2.

[9] In 1971, the Army began to give National Guard recruits 16 hours of additional special disturbance control training recognizing the peculiar role of the National Guard in this area.

It is important to note at the outset that this is not a case in which damages are sought for injuries sustained during the tragic occurrence at Kent State. Nor is it an action seeking a restraining order against some specified and imminently threatened unlawful action. Rather, it is a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard. This far-reaching demand for relief presents important questions of justiciability.

Respondents continue to seek for the benefit of all Kent students a judicial evaluation of the appropriateness of the "training, weaponing and orders" of the Ohio National Guard. They further demand and the Court of Appeals remand would require that the District Court establish standards for the training, kind of weapons, scope and kind of orders to control the actions of the National Guard. Respondents contend that thereafter the District Court must assume and exercise a continuing judicial surveillance over the Guard to assure compliance with whatever training and operations procedures may be approved by that court. Respondents press for a remedial decree of this scope, even assuming that the recently adopted changes are deemed acceptable after an evidentiary hearing by the court. Continued judicial surveillance to assure compliance with the changed standards is what respondents demand.

In relying on the Due Process Clause of the Fourteenth Amendment, respondents seem to overlook the explicit command of Art. I, § 8, cl. 16, which vests in Congress the power:

> "To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline *prescribed by Congress.*" (Emphasis added.)

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The majority opinion in the Court of Appeals does not mention this very relevant provision of the Constitution. Yet that provision is explicit that the Congress shall have the responsibility for organizing, arming and disciplining the Militia (now the National Guard), with certain responsibilities being reserved to the respective States. Congress has enacted appropriate legislation pursuant to Art. I, § 8, cl. 16,[10] and has also authorized the President—as the Commander-in-Chief of the Armed Forces—to prescribe regulations governing organization and discipline of the National Guard.[11] The Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war. The Guard also may be federalized in addition to its role under state governments, to assist in controlling civil disorders.[12] The relief sought by respondents, requiring initial judicial review and continuing surveillance by a federal court over the training, weaponing and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.[13]

The Court of Appeals invited the District Court on remand to survey certain materials not then in the record of the case:

> "[F]or example: *Prevention and Control of Mobs and Riots,* Federal Bureau of Investigation, U. S.

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[10] *E. g.,* 32 U. S. C. A. §§ 105, 501–507, 701–714.

[11] 32 U. S. C. § 110.

[12] 10 U. S. C. § 331 *et seq.*

[13] The initial and basic training of National Guard personnel is, by Regulation of the Department of the Army, pursuant to statutory authority, under federal jurisdiction. Commencing in 1971, National Guard units received, as part of the basic training, 16 hours of special civil disturbance control training, in recognition of the likelihood that National Guard would be the primary source of military personnel called into civil disorder situations. See Par. 3c, Appendix XXV, Aux. F to Supp. 1 to AR 350–1, "Reserve Enlistment Program of 1963" (Aug. 31, 1972).

> Dept. of Justice, J. Edgar Hoover (1967) . . . ; 32 C. F. R. § 501 (1971), *'Employment of Troops in Aid of Civil Authorities'; Instructions for Members of the Force at Mass Demonstrations,* Police Department City of New York (no date); Report of the National Advisory Commission on Civil Disorders (1968)." 456 F. 2d, at 614.

This would plainly and explicitly require a judicial evaluation of a wide range of possibly dissimilar procedures and policies approved by different law enforcement agencies or other authorities; and the examples cited may represent only a fragment of the accumulated data and experience in the various States, in the armed services, and in other concerned agencies of the Federal Government. Trained professionals, subject to the day to day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces with respect to their duties under the Constitution. It would be inappropriate for a district judge to undertake this responsibility, even if in the unlikely event that he possessed requisite technical competence to do so.

Judge Celebrezze in dissent correctly read *Baker* v. *Carr* when he said:

> "I believe that the congressional and executive authority to prescribe and regulate the training and weaponry of the National Guard, as set forth above, *clearly precludes any form of judicial regulation of the same matters.* I can envision no form of judicial relief which, if directed at the training and weaponry of the National Guard, would not involve a serious conflict with a
>
> 'coordinate political department; . . . a lack of judicially discoverable and manageable stand-

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> ards for resolving [the question]; . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; . . . an unusual need for unquestioning adherence to a political decision already made; [and] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.' Baker v. Carr, *supra*, 369 U. S. at 217. . . .
>
> "*Any such relief*, whether it prescribed standards of training and weaponry or simply ordered compliance with the standards set by Congress and/or the Executive, *would necessarily draw the courts into a nonjusticiable political question, over which we have no jurisdiction.*" (Emphasis added) 456 F. 2d., at 619.

In *Flast* v. *Cohen*, 392 U. S. 83 (1968), this Court noted that:

> "[j]usticiability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Yet it remains true that '[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pres-

sures . . . .' *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961)." [14]

In determining justiciability, the analysis in *Flast* thus suggests that there is no justiciable controversy (a) "when the parties are asking for an advisory opinion," (b) "when the question sought to be adjudicated has been mooted by subsequent developments," and (c) "when there is no standing to maintain the action." As we noted in *Poe* v. *Ullman*, 367 U. S. 497 (1961), and repeated in *Flast*, "[j]usticiability is . . . not a legal concept with a fixed content or susceptible or scientific verification. Its utilization is the resultant of many subtle pressures . . . ." 367 U. S., at 508.

In testing this case by these standards drawn specifically from *Flast*, there are serious deficiencies with respect to each. The advisory nature of the judicial declaration sought is clear from respondent's argument and indeed from the very language of the Court's remand. Added to this is that the nature of the questions to be resolved on remand are subjects committed expressly to the political branches of government. These factors when coupled with the uncertainties as to whether a live controversy still exists and the infirmity of the posture of respondents as to standing renders the claims and the proposed issues on remand nonjusticiable.

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially

[14] *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968) (footnotes omitted).

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professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions are appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system; the majority opinion of the Court of Appeals failed to give appropriate weight to this separation of powers.[15]

Voting rights cases such as *Baker* v. *Carr*, 369 U. S. 186 (1962), *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and prisoner rights cases such as *Haines* v. *Kerner*, — U. S. — (1972), are cited by the court as supporting the "diminishing vitality of the political question doctrine." Yet because this doctrine has been held inapplicable to certain carefully delineated situations it is no reason for federal courts to assume its demise. The voting rights cases, indeed, have represented the Court's efforts to strengthen the political system by assuring a higher level of fairness and responsiveness to the political processes, not the assumption of a continuing judicial review of substantive political judgments entrusted expressly to the coordinate branches of government.

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[15] In a colloquy with the Court on the scope of the relief sought under the remand, one Justice asked:

"Would it be a fair characterization of your position that if the case goes back to the district court, you do not quarrel with the specific [National Guard] regulations now in force but (a) you want them made permanent and, (b) you want a continuing surveillance to see that they are carried out; is that a fair statement of your case?"

Mr. Geltner, counsel for respondents, answered:

"Yes, your Honor, that is a fair statement of what we are seeking at this point, understanding that at the time the complaint was filed we were seeking a more specific change in what then existed."

In concluding that no justiciable controversy is presented, it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel,[16] whether by way of damages or injunctive relief. We hold only that no such questions are presented in this case. We decline to require a United States district court to involve itself so directly and so intimately in the task assigned that court by the Court of Appeals. *Orloff* v. *Willoughby*, 345 U. S. 83, 93–94 (1953).

Reversed.

MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL dissent. For many of the reasons stated in Part I of the Court's opinion, they are convinced that this case is now moot. Accordingly, they would vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to dismiss it as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39.

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[16] See *Duncan* v. *Kahanamoku*, 327 U. S. 304 (1946); *Sterling* v. *Constantin*, 287 U. S. 378 (1932), and in *Laird* v. *Tatum*, 408 U. S. 1, 15–16 (1972), we said: "[W]hen presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consdier claims of those asserting such injury; there is nothing in our Nation's history or in the Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied."

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SUPREME COURT OF THE UNITED STATES

No. 71–1553

John J. Gilligan, Governor of Ohio, et al., Petitioners, v. Craig Morgan et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 21, 1973]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE POWELL joins, concurring.

Respondents brought this action in 1970 seeking broad-ranging declaratory and injunctive relief. But the issue presently before the Court relates only to a portion of the relief sought in 1970. Under the Court of Appeals' remand order the District Court was limited in its review to determining the existence of a pattern of "training, weaponing and orders in the Ohio National Guard which singly or together require or make inevitable" the unjustifiable use of lethal force in suppressing civilian disorders. 456 F. 2d 608, 612. The Ohio use-of-force rules have now been changed, and are identical to the Army use-of-force rules. Counsel for respondent stated at oral argument that the use-of-force rules now in effect provide satisfactory safeguards against unwarranted use of lethal force by the Ohio National Guard. Tr. of Oral Arg. 31. And as of 1971 special civil disturbance control training had been provided for the various National Guard units.

It is in this narrowly confined setting that we are asked to decide the issues presented in this case. Respondents have informed us that they seek no change in the current National Guard regulations; rather, they wish to assure their continuance through constant judicial sur-

veillance of the orders, training, and weaponry of the Guard.

Were it not for the continuing surveillance respondents seek, I would have little difficulty concluding that the controversy is now moot. Except for that aspect of the case, all relief requested by respondents has been obtained. While one might argue that the likelihood of future changes in the rules is so attenuated that even the claim for continuing review by the District Court is moot, this issue need not be reached, as the District Court is clearly without power to grant the relief now sought.

Respondents' complaint rests upon a single, isolated, and tragic incident at Kent State University. The conditions that existed at the time of the incident no longer prevail. And respondents' complaint contains nothing suggesting that they are likely to suffer specific injury in the future as a result of the practices they challenge. See *Laird* v. *Tatum*, 408 U. S. 1, 14 (1972). A complaint based on a single past incident, containing allegations of unspecified, speculative threats of uncertain harm that might occur at some indefinite time in the future, cannot support respondents' standing to maintain this action. See Complaint, p. 11, App. 5–6; *Roe* v. *Wade*, 410 U. S. 128 (1973).

The relief sought by respondents, moreover, is beyond the province of the judiciary. Respondents would have the District Court, through continuing surveillance, evaluate and pass upon the merits of the Guard's training programs, weapons, rules-of-force, and orders. The relief sought is prospective only; an evaluation of those matters in the context of a particular factual setting as a predicate to relief in the form of an injunction against continuing activity or for damages would present wholly different issues. This case relates to prospective relief in the form of judicial surveillance of highly subjective and technical matters involving military training and

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command. As such, it presents an "inappropriate . . . subject matter for judicial consideration," for respondents are asking the District Court, in fashioning that prospective relief, "to enter upon policy determinations for which judicially manageable standards are lacking." *Baker* v. *Carr*, 369 U. S. 186, 198, 226 (1962).

For these reasons the judgment of the Court of Appeals must be reversed. On the understanding that this is what the Court's opinion holds, I join that opinion.